88-905

No. ___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

PAUL C. KOHLMAN,

Petitioner,

and

DONALD P. HODEL, ET AL,

v.

BOB MARSHALL ALLIANCE, ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The federal government issued oil and gas leases on large expanses of unexplored public lands. While the government did not retain the specific right to prohibit development; lessee's future exploration and development proposals would require permits and environmental review. For purposes of the decision, the probability of oil or gas production on each lease was about two percent, the normal for federal leases. The Tenth Circuit Court of Appeals has upheld staged review procedure, while the Ninth Circuit has rejected it.

The questions presented are:

1) Whether lease issuance triggers a NEPA requirement for an Environmental Impact Statement considering unproposed and unlikely future exploration, development and production.

2) Whether lease issuance triggers an Endangered Species Act requirement for a biological opinion considering unproposed and unlikely future exploration, development and production.

LIST OF PARTIES

Government parties are Donald P. Hodel, Secretary of the Interior; Richard E. Lyng, Secretary of Agriculture; Robert Burford, Director of the Bureau of Land Management; F. Dale Robertson, Chief of the United States Forest Service; Marvin LeNoue, Montana State Director of the Bureau of Land Management; and John W. Mumma, Regional Forester, Region 1.

Respondents are Bob Marshall Alliance and the Wilderness Society.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Paul C. Kohlman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding on August 1, 1988.

OPINIONS BELOW

The Ninth Circuit issued its opinion in *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), on August

1, 1988. It is reproduced as Appendix A, App. 1. The opinion of the District Court for the District of Montana is reproduced as Appendix B, App. 20.

This case is closely related to *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), which the Ninth Circuit finally decided on July 27, 1988. *Conner* is the subject of a Petition for a Writ of Certiorari filed by Sun Exploration and Production Company, et al, on November 25, 1988. Petitioner requests that *Conner* and *Bob Marshall* be consolidated for review.[1]

JURISDICTION

The Ninth Circuit entered judgment on August 1, 1988. Justice O'Connor entered an order granting the Petitioner an extension of time until November 29, 1988, to file this petition. The Court's jurisdiction to review the Ninth Circuit's judgment rests on 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

This case arises under the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1982) ("MLA"); the National Environmental Policy Act, 42 U.S.C. §§ 4331-4370 (1982) ("NEPA"); and the Endangered Species Act, 16 U.S.C.

[1] Sun Petition appendix page references to the *Conner* and *Park County* opinions are referenced in footnotes to this petition.

§§ 1531-1543 (1982) ("ESA"). Pertinent sections of these statutes are reproduced as Appendix C, App. 42.

STATEMENT OF THE CASE

In 1981, the Secretary of the Interior issued Petitioner, Paul C. Kohlman, an oil and gas lease pursuant to the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1982). The Petitioner's lease and eighteen other leases are located in the Deep Creek Further Planning Area of the Lewis and Clark National Forest in Montana. "Further planning" means that the Forest Service had studied the area for possible inclusion in the National Wilderness System, 16 U.S.C. §§ 1131-1136 (1982), but had neither recommended it for designation, nor recommended it as non-suitable for wilderness.

Accordingly, the leases contained a "Further Planning Area Stipulation" which states that Congress may ultimately designate the area wilderness. In that event, the leases would be subject to the wilderness legislation. The leases also contained a "Threatened or Endangered Species Stipulation" that could restrict or disallow future activities that violate the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982). Apart from these two stipulations, which would allow the government or Congress to preclude development in certain circumstances, the leases include no general stipulation which would allow the government discretion to completely preclude exploration.

Prior to issuance of the leases, the Forest Service completed an Environmental Assessment (EA)[2] pursuant to NEPA. The EA described impact that the public might expect if intensive future exploration activities took place in the Deep Creek area. However, the EA concluded that the government need not produce an Environmental Impact Statement (EIS)[3] because the issuance of the leases was a paper transaction that did not, in itself, authorize any environmental disturbance. Since there was no environmental disturbance proposed, the action did not reach the threshold of "significance" required to trigger an EIS. *See* 42 U.S.C. § 4332(2)(C) (1982), App. 42-43.

When a lessee actually proposed future disturbance such as drilling, development, or production; the government would undertake further environmental review

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[2] "Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible which serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

40 C.F.R. § 1508.9 (1987).

[3] " 'Environmental impact statement' means a detailed written statement as required by [NEPA] section 102(2)(C) [42 U.S.C. § 4332(2)(C) (1982), App. 42-43]" 40 C.F.R. § 1508.11 (1987).

pursuant to NEPA. At that time, the site specific information necessary for environmental documentation would be available. Staged environmental review would parallel stages of exploration and development proposed by the lessee.

The government undertook a similar staged review to comply with the consultation requirements of the Endangered Species Act, 16 U.S.C. § 1536 (1982), App. 44-46. As with the NEPA review, it restricted the biological opinion to paper issuance of the lease. The opinion concluded that without site specific proposals, the government had insufficient information to render an opinion on anything beyond the leasing phase.

The Forest Service considers area-wide uses for National Forest lands in Forest Land and Resource Management Plans. *See* National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1982). The uses it considers include the oil and gas production, wilderness, recreation, and endangered species values that allegedly conflict in this case. The Forest Service completed a Forest Plan during the pendency of this litigation.[4] The Petitioner raised the issue of completion of the plan in briefing, but the Court of Appeals did not address it.

Litigation began when the Respondents challenged the issuance of the leases on the basis that the Forest Service had failed to complete an EIS and comprehensive

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[4] Prior to the new plan, "Multiple Use Plans" completed by forest ranger districts were in effect.

biological opinion covering all possible future exploration, development, and production activity. The Respondents also raised several other issues which the Petitioner has not appealed. The Forest Service upheld lease issuance on administrative appeal. The Respondents then appealed to the United States District Court for the District of Montana. The District Court ruled in favor of the Respondents on the issues raised in this Petition. *Bob Marshall Alliance v. Watt*, No. 82-015-GF (D. Mont., App. 20. The Ninth Circuit Court of Appeals upheld the district court. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988), App. 1.

REASONS FOR GRANTING THE WRIT

Bob Marshall and the closely related *Conner* case are the most important cases in onshore federal oil and gas development today. They have spawned speeches, articles, and seminars throughout the public land states. They are among the environmental groups' greatest victories, and among federal lessees greatest defeats.

I. IN *BOB MARSHALL*, THE NINTH CIRCUIT REJECTED LONG ESTABLISHED NEPA REVIEW PROCEDURES UPHELD BY THE TENTH CIRCUIT IN *PARK COUNTY*

A. The Circuits Are in Conflict over the Need for a Leasing EIS

The issue these cases present is as follows: when must the government prepare an EIS that considers the environmental impact of development of an oil or gas field? Is that time at issuance of a lease, when the oil or

gas field is not much more than a gleam in the eye of an imaginative geologist and there is a whole national forest to explore? Or, is that time when a wildcatter drills the first well? Or, finally, is that time when an oil company actually discovers oil or gas?

In *Bob Marshall* the Ninth Circuit held that the time for an EIS was the gleam in the eye stage, when the government issued the lease. The court relied on *Conner* to hold that lease issuance violated NEPA because the government failed to prepare a comprehensive EIS addressing the impact of possible future exploration and development scenarios. 852 F.2d at 1227, App. 11; *Conner* 848 F.2d at 1450. The *Conner* court expressed its holding as follows:

> Appellants also complain that the uncertain and speculative nature of oil exploration makes preparation of an EIS untenable until lessees present precise site-specific proposals for development. The government's inability to fully ascertain the precise extent of the effects of mineral leasing in a national forest is not, however, a justification for failing to estimate what those effects might be before irrevocably committing to the activity.

848 F.2d at 1450.[5]

This holding is squarely at odds with *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987). As in *Bob Marshall* and *Conner*, the oil and gas lease in question was a raw exploration play. As in *Bob Marshall*, the *Park County* "plaintiffs argue[d] that an EIS must be prepared at the leasing stage because of

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[5] Sun Petition at A-18.

the eventual cumulative and foreseeable effects of exploratory drilling and then full field development." 817 F.2d at 622.[6] Despite the similarities, the *Park County* court responded very differently: "We merely hold that, in this case, developmental plans were not concrete enough at the leasing stage to require such an inquiry." 817 F.2d at 623.[7]

The *Park County* court went on to explain its decision:

> When BLM [United States Bureau of Land Management] is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD [Application for a Permit to Drill] is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken. Only then can BLM determine whether a river system is implicated, where access will be needed and how it should be accomplished, and which wildlife is affected. In short, the specificity that NEPA requires is simply not possible absent concrete proposals.

Park County, 817 F.2d at 624[8] The court found that NEPA did not require the government to produce a "boilerplate EIS" that "would not measurably improve decision-making process." *Id.*

Thus the two circuits considered virtually identical fact situations and the same practical constraints on the availability of site specific information. Nevertheless,

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[6] Sun Petition at D-23.

[7] Sun Petition at D-25.

[8] Sun Petition at D-26.

they came to exactly opposite conclusions. The Ninth Circuit requires an EIS for oil and gas lease issuance, while the Tenth Circuit does not.[9]

The EIS requirement is more than minor or routine procedure. Even production of a "boilerplate" EIS requires large amounts of time and money. Preparation of this document for leases that will probably never produce or be drilled is a severe impediment to making a leasing decision.

B. Segmented Decision-Making Is a Result of the Split between Circuits, Not a Way Around the Split

In *Park County*, the Tenth Circuit reasoned that because an EIS produced at the leasing stage would be useless, NEPA did not require it. 817 F.2d at 624. It ended its analysis there. On the other hand, the Ninth Circuit in *Conner* and *Bob Marshall* apparently skipped any consideration of EIS usefulness. The Ninth Circuit did not take issue with the government's and lessees' argument that lack of site specific information made a useful EIS impossible. *Conner*, 848 F.2d at 1451.[10] Instead, it offered a segmented decision-making process as an

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[9] The further confusion in this area of the law is revealed by the fact that the *Park County* court relied on a District of Columbia Circuit case, *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982), while the *Conner* court relied on another District of Columbia Circuit case, *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983).

[10] Sun Petition at A-19.

alternative to doing an EIS. 852 F.2d at 1227-8, App. 11; *Conner*, 848 F.2d at 1449-50.[11]

Under this procedure, the Ninth Circuit found that the government could issue the lease without an EIS; but it must retain the right to prohibit all surface disturbing activity. *Id.* Future decisions would allow or disallow surface disturbing actions, and EISs must accompany those decisions. In effect, each time the lessee applied for a permit he would risk losing his lease. Interest groups who opposed development could subject lessees to multiple political battles as they proceeded through the various stages of development.

The Ninth Circuit's solution to the NEPA problem is premature. NEPA was not intended to produce boilerplate documents that serve no purpose. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 557-8 (1978) (Only substantial defects in NEPA compliance are grounds to set aside decisions). If the Tenth Circuit's holding that NEPA does not require a useless EIS is correct; then NEPA does not require the Ninth Circuit's segmented decision-making as a substitute for the useless EIS.

II. IN *BOB MARSHALL*, THE NINTH CIRCUIT REJECTED LONG ESTABLISHED ESA REVIEW PROCEDURES UPHELD BY NUMEROUS CIRCUIT COURT DECISIONS

The biological opinion requirement of the ESA, 16 U.S.C. § 1536(b)(3)(A), App. 44-45, is analogous to the EIS

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[11] Sun Petition at A-16 to A-17.

requirement of NEPA. It is to inform decision-makers of the impacts on endangered species. As with EAs and EISs produced under NEPA, the federal government has not required biological opinions to consider speculative unproposed future actions. The reasons are the same. The government and lessees simply have no knowledge of the location, scope, nature, or even whether activities will take place. Therefore, the government cannot make any useful estimates of the impact on endangered species.

Circuit Courts of Appeals have upheld staged review under ESA in *Park County Resource Council v. United States Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987), *aff'g*, 613 F. Supp. 1182, 1188 (D. Wyo. 1985); *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 680 (D.C. Cir. 1982); *North Slope Borough v. Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980); and, *Village of False Pass v. Clark*, 733 F.2d 605, 607 (9th Cir. 1984). *See also Conner v. Burford*, 648 F.2d 1441, 1462-4 (9th Cir. 1988) (Wallace, J. dissenting) (Conflict within Ninth Circuit).[12] The Ninth Circuit rejected staged ESA review in *Conner* and *Bob Marshall* for the same reasons that it rejected staged NEPA review in those cases. 852 F.2d at 1228, App. 12-13; *Conner*, 848 F.2d at 1454.[13]

The conflict among circuits is even more pronounced for ESA than for NEPA. The reasons for granting the writ to resolve this conflict are equally compelling.

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[12] Sun Petition at A-45 to A-48.

[13] Sun Petition at A-25 to A-26.

III. CONTINUATION OF THE SPLIT IN THE CIRCUITS WILL ALLOW SPECIAL INTEREST GROUPS TO VETO ISSUANCE OF FEDERAL OIL AND GAS LEASES

A. Practical Constraints Will Allow Anyone with a Lawyer to Stop Mineral Development on the Public Lands

As the Tenth Circuit pointed out in *Park County*, the federal government simply does not have the resources to do EISs for the thousands of oil and gas leases issued each year. In 1984, the government issued 5,478 leases; but for all activities, the Department of the Interior did only 115 EISs. 817 F.2d at 623. If the new EISs are to have any substantive content at all, then a drastic shift in resources in the Department of the Interior must take place. Under present budget constraints this is not realistic.

Recent experience has shown that in the absence of clear judicial direction, the government will not do EISs; but instead, it will continue with lease sales and wait for third party environmental groups to protest. Protests have been forthcoming in Montana, Utah, and Colorado. Threats of litigation based on faulty fulfillment of NEPA and ESA review for speculative future development scenarios has caused the government to withdraw leases or lease sales.[14] Groups in Montana have undertaken negotiations with the federal government to reach a solution

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[14] Environmental groups in Colorado and Utah may sue in the District of Columbia Circuit and attempt to rely on *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), to demand and EIS and thereby bypass the Tenth Circuit.

favorable to their interests in stopping leasing. By caving-in to special interest group demands, the government may avoid litigation and the cost of EISs. But the leasing program is crippled and the nation looses necessary oil and gas reserves.

Like waste disposal, construction of power plants, and other kinds of development necessary to our society; anyone who can afford to hire a lawyer will be able to stop oil and gas development on federal lands.

Staged review is based on the inherent uncertainties of geological exploration. It allows low cost decision-making where the existence of resources is uncertain. By upsetting this long-standing scheme, the *Conner* and *Bob Marshall* decisions place other types of geological exploration on the public lands in jeopardy. For example, under *Conner*, speculative mining exploration may require preparation of an EIS considering complete development of a mine. This huge front end cost for environmental documentation will kill most ventures before they get started. Neighbors or special interest groups could say no to exploration, and thus prohibit future development.

B. The Decision Replaces a Logical and Comprehensive Land Use Planning System with a Fragmented One Suited to Special Interests

The federal government has instituted a comprehensive planning system for federal lands. 16 U.S.C. §§ 1600-1614 (1982); 43 U.S.C. §§ 1711-1722 (1982). Land use plans anticipate broad conflicts such as those that the government might document in the EISs and biological

opinions required by the Ninth Circuit in *Bob Marshall*. The plans inventory resources such as wildlife and recreational values, and make recommendations to protect those resources. Withdrawal from mineral leasing is among the possible recommendations and actions where mineral development is incompatible with valuable surface resources. An EIS accompanies each plan.

The planning system recognizes that land managers can see surface resources, and thus it concentrates on protecting those resources. The land managers cannot see geological resources, so plans cannot describe them in detail. Nevertheless, land managers consider potential impacts of mineral development when they develop protective measures for surface resources. 36 C.F.R. § 219.22 (1988). Where the plans do not find irreconcilable conflicts between surface and subsurface resources, the principle of multiple use prevails, and the land remains available for mineral development. *See* 16 U.S.C. §§ 528-531 (1982) (Multiple Use and Sustained Yield Act).

The holdings in *Conner* and *Bob Marshall* overturn the present logical system and replace it with one that gives special interest groups great power. Under the Ninth Circuit decisions, the mineral developer or government leasing agency proposes leasing or development; then those interested in surface resources react by stating whether they think surface values outweigh mineral values. Special interest groups may argue that the government should deny the activity or revoke the leases. The result is a series of political and administrative land use battles outside of the established land use planning process. The comprehensive approach set up by Congress is shattered. *See* 16 U.S.C. § 1600(3) (1982) (Congress finds

that coordinated approach to resource planning serves the national interest).

The Court's consideration of a conflict between development of the public lands and Indian religious sites in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, ___ U.S. ___, 108A S.Ct. 1319 (1988), presented a similar situation. At oral argument, counsel for the Cemetery Association was asked if Indians could identify religious sites prior to development proposals. Counsel responded that the developer should first state the proposed development's location, then Indian groups would come forth with the religious significance of the land and whether they thought development was compatible. The Court rejected this impractical scheme, and it should reject the equally impractical counterpart here applied to environmental concerns.

IV. ABSENCE OF THE GOVERNMENT IS NOT DISPOSITIVE OF THE CERT-WORTHINESS OF THIS PETITION

When it issues oil and gas leases on the public lands, the government has multiple obligations. It must protect the environment, but it also has a mandate to develop resources. Often, as in this case, those obligations conflict. In such cases, the government can either resolve the conflict, or avoid it by doing more studies.

The government cannot be an advocate for the lessees, or even an advocate for resource development. It actually represents a set of procedures for issuing leases.

The Respondents brought this case to argue that the government should adopt a different set of procedures.

The Respondents believed that more study of the conflict, that is more and bigger EISs, would result in a different decision; one that was more favorable to them.

The government is in the business of producing the studies, and the Respondents have demanded more of its product. Nevertheless, the government argued against more studies in the D.C. Circuit, the Ninth Circuit, and Tenth Circuit. Ultimately, if the government looses this case, then it must adopt new procedures that will require more study of the conflict. The only certainty is that the new procedures will be more burdensome and lead to decisions more favorable to the Respondents.

On the other hand, the Petitioner will likely loose his lease. The industry, and in particular independent oilmen like the Petitioner, will not be able to lease lands essential to the continuation of their businesses. The nation will lose essential oil and gas reserves.

Our system of government has reached a point where every time an individual or group does not like the substance of a government decision, they go to court to ask for more procedure and more studies to accompany the decision. No matter that the demanded procedure does not comport with geological reality or only produces useless boilerplate EISs. In many situations, we are reaching a point where the cost of making a decision is greater than the value of the decision itself. Those who oppose a decision can win by raising the cost of decision-making so high that the government cannot afford to make the decision.

The federal administrative and political systems have proven to be poor guardians against this destructive trend. For each controversial problem, the solution seems to be more government studies. The theoretical arguments that conflicts require more study appeal to politicians who wish to placate all sides, and to the administrators who will produce the studies. The cost to the nation has been substantial.

This is a case where the courts, rather than the Administration or Congress, have asked for more studies. It should be no surprise that it has produced tremendous internal conflict in the political and administrative machinery that determines whether the government files a petition for a writ of certiorari.[15] The Petitioner respectfully submits that, even if the government does not wish petition, now is the time for the Court to act in the interest of the nation and put an end to one example of useless and dilatory procedure.

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[15] The government requested an extension of time so that it had a total of four months to make the decision to petition. The Petitioner learned of the government's negative decision only during the final preparation of this petition.

CONCLUSION

The Ninth Circuit Court of Appeals would reshape the oil and gas leasing system on public lands. In support of the drastic move, it cites an eighteen year old statute designed to provide decision-makers with environmental documentation. Yet eighteen years ago, Congress wrote that NEPA was not to amend the substantive obligations of government agencies. 42 U.S.C. § 4334 (1982), App. 43. Now, in the Ninth Circuit, the long established procedures for issuance of oil and gas leases that have been upheld in the Tenth Circuit Court of Appeals are no longer good enough.

No doubt, the government can re-adjust to the new regime. All that is necessary is to recognize the requests of special interest groups. One may rationalize that such an outcome is not so bad. After all, public input is an important part of modern decision-making. But, as a practical matter, the process left in place by conflicting circuit court opinions leaves one more essential element of our economy to the whim of someone who would hire a lawyer to stop it.

The Court should exercise its supervisory authority to resolve the conflict of authority between the Circuits and to bring environmental review procedures back within the intent of NEPA and ESA. NEPA and ESA only require documents that are a practical aid to decision-making.

Respectfully submitted,

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November 29, 1988

APPENDIX A

BOB MARSHALL ALLIANCE, et al., *Plaintiffs-Appellees,* v. DONALD P. HODEL, SECRETARY OF THE INTERIOR,* et al., *Defendants,* and PLACID OIL COMPANY, *Defendant-Intervenor,* and PAUL C. KOHLMAN and ANN E. KOHLMAN, *Defendants-Appellants.*	No. 86-4019 D.C. No. CV 82-15-GF OPINION

Appeal from the United States District Court
for the District of Montana

Paul G. Hatfield, District Judge, Presiding

Argued August 6, 1987–Seattle, Washington
Submitted June 16, 1988

Filed August 1, 1988

Before: William C. Canby, Jr., Stephen Reinhardt
and Robert R. Beezer, Circuit Judges.

Opinion by Judge Reinhardt

SUMMARY

Environmental Law

Appeal from a judgment finding that the defendant agencies violated NEPA and the ESA. Affirmed in part, reversed in part and remanded. The court held that NEPA was violated by (1) issuing a non-NSO lease without an EIS preparation; (2) issuing any leases at all without adequate consideration of the no action alternative; and (3) ESA was violated by issuing leases without preparation of a biological opinion assessing effect of leasing and post-leasing activities on endangered species in the area.

An area in Montana known as Deep Creek is an important refuge for threatened or endangered species. The Forest Service prepared an environmental assessment of Deep Creek and concluded that oil and gas leasing would have no significant effect on the quality of the human environment. This FONSI absolved the agencies of the need to prepare an environmental impact statement (EIS) on the sale of the leases. Regarding the Endangered Species Act (ESA), the biological opinion concluded that the sale of leases in itself would not threaten the species in question, but found that there was insufficient information available to issue a comprehensive biological opinion beyond the initial leasing phase. Eventually oil and gas leases were issued. Some contained "no surface occupancy" (NSO) stipulations, others imposed reasonable conditions on surface-disturbing activity. All contained threatened or endangered species

stipulations. Appellees the Bob Marshall Alliance challenged the leases. The district court awarded summary judgment for Marshall Alliance finding that the agencies violated NEPA, Forest Service regulations, and the ESA.

[1] Regarding the NEPA claims, this court held in *Conner v. Burford,* 836 F.2d 1521, that non-NSO leases cannot be sold without preparation of an EIS because non-NSO leases represent an irretrievable commitment of resources. [2] The ESA requires the Fish and Wildlife Service(FWS) to consider all phases of the agency action in its biological opinion. Staged consultation is not sufficient to comply with the ESA and stipulations in the leases cannot substitute for comprehensive biological opinions. [3] In this case, the agencies violated NEPA by failing to prepare an EIS for the non-NSO leases. The district court's judgment is reversed insofar as it requires preparation of an EIS for the sale of NSO leases. [4] This court cannot determine from the record which of the Deep Creek leases protect absolutely against surface-disturbing activity. On remand, the district court may need to determine which of the Deep Creek leases are NSO leases. [5] Because the Deep Creek leases were issued without preparation of a comprehensive biological opinion, the ESA was violated.

[6] This court answers affirmatively the only question raised by the agencies' contentions on appeal: whether the no action alternative should have been considered before the NSO leases were issued. [7] Because the Deep Creek lease sale opens the door to potentially harmful post-leasing activity, it involves unresolved conflicts concerning alternative uses of available resources; NEPA therefore requires that alternatives–including the

no-leasing option–be given full and meaningful consideration.

COUNSEL

J. Carol Williams, United States Department of Justice, Washington, D.C., for the defendants-appellants.

Constance E. Brooks, Mountain States Legal Foundation, Denver, Colorado, for the defendant-appellant Paul C. Kohlman.

Stephan C. Volker, Sierra Club Legal Defense Fund, San Francisco, California, for the plaintiffs-appellees.

OPINION

REINHARDT, Circuit Judge:

This appeal involves the issuance of oil and gas leases on the area known as Deep Creek, located in Montana's Lewis and Clark National Forest. The Bob Marshall Alliance and the Wilderness Society (collectively "Marshall Alliance") brought suit against several federal agencies and the lessees,[1] challenging issuance of the leases on several statutory grounds.

First, Marshall Alliance alleges that issuance of the leases violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* (1982). NEPA mandates the preparation of an environmental impact

statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C). In order to determine whether an EIS is required, the federal agency concerned prepares an environmental assessment. 40 C.F.R. § 1508.9 (1987). Based on that assessment the agency may conclude that the action will not significantly affect the environment and issue a "Finding of No Significant Impact" ("FONSI") in lieu of an EIS. *Id.* § 1508.13. We have held that an EIS is required at the point where a federal agency makes an "irreversible and irretrievable commitment of the availability of resources." *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979). Marshall Alliance contends that, because the leases in question here were issued without an EIS, the requirements of NEPA were not met.

Second, NEPA also requires that federal agencies "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1982); *see* 40 C.F.R. § 1508.9(b) (1987) (environmental assessment must include discussion of alternatives). Marshall Alliance contends that the alternative of not issuing the Deep Creek leases – the "no action alternative" – was not considered adequately, in violation of NEPA's mandate.

Marshall Alliance's third claim involves the Endangered Species Act of 1973 (the "ESA"), 16 U.S.C. §§ 1531 *et seq.* (1982). The ESA establishes a consultation process

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[1] One of the lessees, Paul C. Kohlman, remains a party to this appeal.

by which federal agencies ensure that their actions will not jeopardize a threatened or endangered species or damage the habitat of such a species. *Id.* § 1536(a)(2). The statute requires preparation of a biological opinion based on "the best scientific and commercial data available" whenever a threatened or endangered species is present in the area of a proposed action. *Id.* §§ 1536(a)(2), (b). If the opinion concludes that the action would jeopardize a protected species, the action must be modified. *Id.* Marshall Alliance alleges that the requirements of the ESA were not met before the Deep Creek leases were issued.

Following our recent opinion in *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988), we hold that the defendant agencies violated the provisions of both NEPA and the ESA.

FACTS AND PROCEEDINGS BELOW

The Deep Creek Further Planning Area ("Deep Creek") comprises about 42,000 acres of wild, mountainous terrain. It is bounded to the west by three designated wilderness areas and to the east by three wilderness study areas. Deep Creek offers spectacular scenery and recreational opportunities for fishers, hikers, and outdoors enthusiasts of all kinds. Perhaps most important, it is home to a large and unique wildlife population. Deep Creek is an important refuge for four threatened or endangered species: the grizzly bear, the gray wolf, the peregrine falcon, and the bald eagle.[2] In

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[2] Appellees claim that Deep Creek, together with the contiguous wilderness areas, contains a substantial portion of the entire grizzly bear population of the lower 48 states.

addition, bighorn sheep, elk, mule and white-tailed deer, black bear, moose, mountain goat and mountain lion abound in the area. At the same time, Deep Creek offers opportunities for resource developers. The area is located in the Overthrust Belt, an extensive geologic zone in which major discoveries of oil and natural gas have already been made.

In 1977, the United States Forest Service began reviewing national forest lands to determine which areas should be recommended for wilderness designation. Through this Roadless Area Review and Evaluation ("RARE II") process, the Forest Service classified areas as either wilderness, nonwilderness, or further planning. Those lands classified as further planning areas are open for all uses permitted under applicable land use plans–including oil and gas exploration–pending the development of management plans which will consider whether to recommend the area for inclusion in the wilderness system. *See California v. Block,* 690 F.2d 753, 758 (9th Cir. 1982). In order to preserve the possibility of wilderness designation, the final RARE II environmental impact statement declared that development activities that might reduce the land's wilderness potential are prohibited in further planning areas.

The RARE II evaluation awarded Deep Creek the highest possible wilderness rating–a "perfect score" on the Wilderness Attribute Rating System. Deep Creek also received a very high rating on its potential for natural gas discovery. Because Deep Creek possesses both highly favorable wilderness characteristics and a high potential for the development of natural gas resources, it was classified as a further planning area.

Following this designation, the Bureau of Land Management ("BLM") of the Interior Department received sixteen applications for oil and gas leases on Deep Creek. The Forest Service prepared an environmental assessment of Deep Creek and concluded that such leasing would have no significant effect on the quality of the human environment. This FONSI absolved the agencies of the need to prepare an EIS on the sale of the leases. With regard to the requirements of the ESA, the Forest Service requested formal consultation with the Fish and Wildlife Service ("FWS") regarding the effects of the lease issuance on the threatened and endangered species in Deep Creek. The biological opinion issued by FWS concluded that the sale of leases in itself would not threaten the species in question, but found that there was insufficient information available to issue a comprehensive biological opinion beyond the initial leasing phase.

Beginning in January 1982, BLM issued the sixteen leases for which applications had been received; subsequently BLM issued three simultaneous oil and gas leases by lottery. Collectively these leases cover all of the land within Deep Creek. Some of the leases contain "no surface occupancy" ("NSO") stipulations, which prohibit the lessee from engaging in any surface-disturbing activity. Others contain various stipulations that allow the Secretary of the Interior to impose reasonable conditions on surface-disturbing activity. All of the leases contain "threatened or endangered species stipulations," which state that surface-disturbing activity may be restricted if it would have a detrimental effect on endangered or threatened species or their habitats.

In February 1982, following a series of administrative appeals, Marshall Alliance brought this action in federal district court to challenge the issuance of the Deep Creek leases. Specifically, Marshall Alliance alleged that NEPA required preparation of an EIS prior to the issuance of the leases; that the defendant agencies failed to consider the alternative of not issuing leases, again in violation of NEPA; that the leases would impair the wilderness character of Deep Creek in violation of Forest Service regulations; and that the consultation process mandated by the ESA had not taken place.

The district court awarded summary judgment for Marshall Alliance. The court held that the agencies violated NEPA and Forest Service regulations by failing to prepare an EIS for the Deep Creek lease, and that the stipulations (both NSO and non-NSO) were insufficient to comply with NEPA's mandate. The court also held that the agencies violated NEPA by failing to give meaningful consideration to the noleasing alternative. Finally, the court held that the effects of leasing on threatened and endangered species in Deep Creek had not been properly assessed, as the ESA requires. The court set aside the actions of the agencies in issuing the leases and enjoined the agencies from issuing any leases on Deep Creek pending compliance with NEPA, the ESA, and agency regulations.

The defendants appeal from the district court's decision. They contend that both NEPA and the ESA are satisfied by a process of "staged consultation" under which the effects of surface-disturbing activity are analyzed as specific activities are actually proposed. They

argue that ongoing NEPA evaluation and ESA consultation, combined with the various stipulations in the leases, will protect environmental interests as fully as the two statutes require.

DISCUSSION

I. The Decision in *Conner*

Some of the issues raised in this appeal are disposed of by our recent opinion in *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988). That case also involved the sale of oil and gas leases on national forest lands in Montana. As in the instant case, the leases were issued without preparation of an EIS. Some of the leases contained NSO stipulations and some did not. Again as in the instant case, a comprehensive biological opinion was not prepared prior to issuing the leases. The plaintiffs challenged the lease sale, claiming violations of NEPA and the ESA.

[1] On the NEPA claims, we held that the sale of an "NSO lease" – defined as a lease that "absolutely forbid[s] the lessee from occupying or using the surface of the leased land unless a modification of the NSO stipulation is specifically approved by the BLM" – does *not* constitute the "go/no go point of commitment at which an EIS is required." *Id.* at 1527-29. However, we held that "non-NSO leases" – that is, leases which "do not reserve to the government the absolute right to prevent all surface-disturbing activity" – cannot be sold without preparation of an EIS, because non-NSO leases represent an irretrievable commitment of resources. *Id.* at 1529-32.

[2] With regard to the ESA claims, we held that the ESA requires the FWS to consider *all* phases of the agency action – including post-leasing activities as well as the lease sale itself – in its biological opinion. Incomplete information, we stated, "does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available." *Id.* at 1534. The FWS "violated the ESA by failing to use the best information available to prepare comprehensive biological opinions considering all stages of the agency action." *Id.* at 1535. We further held that staged consultation was not sufficient to comply with the ESA and that stipulations in the leases could not substitute for comprehensive biological opinions. *Id.* at 1535-38.

II. Preparation of an EIS

[3] It is clear from our decision in *Conner* that sale of the Deep Creek leases required preparation of an EIS unless the lease "absolutely prohibits surface disturbance in the absence of specific government approval." *Id.* at 1527 n.15; *see also Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983). No EIS was prepared on any of the leases. Following *Conner*, we affirm the district court's holding that the agencies violated NEPA by failing to prepare an EIS for the non-NSO leases, and reverse the district court's judgment insofar as it requires preparation of an EIS for the sale of NSO leases.

[4] As in *Conner*, we cannot determine from the record which of the Deep Creek leases protect absolutely against surface-disturbing activity. Four of the leases apparently contain NSO stipulations covering the entire

leased acreage; some of the others contain NSO stipulations covering part of the leased acreage; some leases contain both NSO stipulations and less strict stipulations regarding regulation of surface-disturbing activity. On remand, the district court may need to determine which of the Deep Creek leases are NSO leases – that is, leases in which "the language of the stipulation, construed with the rest of the lease, absolutely prohibits surface disturbance in the absence of specific government approval." *Conner*, 836 F.2d at 1527 n.15.[3]

III. The ESA Claims

[5] As in *Conner*, the Deep Creek leases were issued without preparation of a comprehensive biological opinion as to the effects of the leases *and* of all post-leasing activities on threatened and endangered species. This violated the ESA. The threatened and endangered species stipulations in the leases "cannot be substituted for comprehensive biological opinions." *Id.* at 1538. We therefore affirm the district court's decision that the defendant agencies violated the ESA, and hold that the statute

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[3] Marshall Alliance contends that the NSO stipulations in the Deep Creek leases were conditioned on the fact that the surrounding lands were leased for surface occupancy and directional drilling was therefore possible. The Alliance argues that the NSO stipulations affect only that portion of the leased land that lies within a half-mile of areas where directional drilling would be allowed and that, if surface occupancy is disallowed on the surrounding lands, the NSO stipulations are completely ineffective. We leave this issue, which involves construction of the leases and the language of the stipulations, for the district court's consideration.

requires the FWS to prepare a biological opinion assessing the impact of the issuance of the Deep Creek leases and of all post-leasing activities on threatened and endangered species.

IV. The No Action Alternative

Finally, Marshall Alliance argues that the defendant agencies violated NEPA by failing to give adequate consideration to the no action alternative – that is, the option of not issuing any oil and gas leases on Deep Creek. The Alliance contends that the agencies abandoned the no action alternative because they believed that declining to issue the leases based on wilderness considerations alone would violate the Wilderness Act, 16 U.S.C. §§ 1131 *et seq.* (1982), and further argues that the agencies' construction of the law is erroneous. Because the agencies themselves have not raised this argument on appeal, we need not consider it here.

[6] Nor do the agencies contend on appeal that they considered the no action alternative. Rather, they argue that because the NSO stipulations preclude any surface-disturbing activity on Deep Creek, the NSO leases do not create any "unresolved conflicts" that would trigger NEPA's consideration of alternatives requirement. We observe that the agencies have apparently abandoned any contention that issuance of non-NSO leases does not require consideration of the no action alternative. Thus, only one question is raised by the agencies' contentions on appeal: whether the no action alternative should have been considered before the NSO leases were issued. We answer that question in the affirmative.

NEPA requires that federal agencies consider alternatives to recommended actions whenever those actions "involve[] unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1982). The goal of the statute is to ensure "that federal agencies infuse in project planning a thorough consideration of environmental values." *Conner,* 836 F.2d at 1532. The consideration of alternatives requirement furthers that goal by guaranteeing that agency decisionmakers "[have] before [them] and take[] into proper account all possible approaches to a particular project (*including total abandonment of the project*) which would alter the environmental impact and the cost-benefit balance." *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission,* 449 F.2d 1109, 1114 (D.C. Cir. 1971) (emphasis added). NEPA's requirement that alternatives be studied, developed, and described both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place. *Id.* Informed and meaningful consideration of alternatives – including the no action alternative – is thus an integral part of the statutory scheme.

Moreover, consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, 42 U.S.C. § 4332(2)(C)(iii) (1982), the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. *See id.*§ 4332(2)(E). The language and effect of the two subsections also indicate that the consideration of alternatives requirement is

of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects. An EIS is required where there has been an irretrievable commitment of resources; but unresolved conflicts as to the proper use of available resources may exist well before that point. Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement. *See City of New York v. United States Department of Transportation*, 715 F.2d 732, 742 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974); *California v. Bergland*, 483 F. Supp. 465, 488 (E.D.Cal. 1980), *aff'd sub nom. California v. Block*, 690 F.2d 753 (9th Cir. 1982). In short, any proposed federal action involving unresolved conflicts as to the proper use of resources triggers NEPA's consideration of alternatives requirement, whether or not an EIS is also required.

[7] Issuance of the Deep Creek leases involves such conflicts. Indeed, this case presents a useful illustration of the need for an independent consideration of alternatives requirement. The Deep Creek NSO leases do not represent an irretrievable commitment of resources, and therefore their sale does not require preparation of an EIS. *Conner*, 836 F.2d at 1529. Nevertheless, the sale of Deep Creek leases – both NSO *and* non-NSO – involves conflicts as to the present and future uses of Deep Creek, because the issuance of the leases may allow or lead to other activities that would affect Deep Creek's suitability for wilderness designation. As we made clear in *Conner*, the sale of leases cannot be divorced from post-leasing

exploration, development, and production. *Id.* at 1534; *cf. Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985) (EIS must consider cumulative environmental effects of agency action). Because the Deep Creek lease sale opens the door to potentially harmful post-leasing activity, it "involves unresolved conflicts concerning alternative uses of available resources"; NEPA therefore requires that alternatives – including the no-leasing option – be given full and meaningful consideration.[4]

While the defendant agencies do not argue that the no action alternative was weighed by the Forest Service, defendant Kohlman asserts that such consideration was in fact afforded to the full extent required by NEPA. Kohlman argues that if the agencies had either denied or deferred action on the Deep Creek lease applications, their action would have constituted an illegal administrative "withdrawal" of Deep Creek from mineral leasing.[5] Therefore, he contends, further consideration of these options was not required. We reject this argument. "Withdrawal" of public lands requires a formal procedure which, for parcels exceeding 5000 acres, includes

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[4] We observe that, by definition, the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or the statutory mandate becomes ineffective.

[5] The Forest Service apparently was of the same view with regard to deferring action on the lease applications. The alternative of denying all leases was rejected as "unviable" on other grounds not raised by the appellants. United States Forest Service, *Environmental Assessment – Oil and Gas Leasing: Deep Creek & Reservoir North Rare II Further Planning Areas* 46-47 (rev. Jan. 1981).

congressional approval; the land is effectively segregated from the operation of public land laws for a period of up to 20 years. Federal Land Policy and Management Act, 43 U.S.C. § 1714 (1982). We fail to see how a decision not to issue oil and gas leases on Deep Creek would be equivalent to a formal withdrawal. Kohlman cites only one case, *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383 (D.Wyo. 1980), as authority for the proposition that deferring action on oil and gas lease applications can constitute an unlawful administrative withdrawal. *Mountain States* is not binding on us and we do not find its reasoning persuasive. In that case, the court concluded that the Interior and Agriculture Departments had illegally withdrawn over a million acres of land because they had failed to act on oil and gas lease applications and had thereby removed the land from the operation of the Mineral Leasing Act of 1920. *Id.* at 391. Yet as the court acknowledged, the Mineral Leasing Act gives the Interior Secretary discretion to determine which lands are to be leased under the statute. 30 U.S.C. § 226(a) (1982); *see Mountain States*, 499 F.Supp. at 391-92. We have held that the Mineral Leasing Act "allows the Secretary to lease such lands, but does not require him to do so. . . . [T]he Secretary has discretion to refuse to issue any lease at all on a given tract." *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975) (citing *Udall v. Tallman*, 380 U.S. 1, 4 (1965)), *cert. denied*, 425 U.S. 973 (1976). Thus refusing to issue the Deep Creek leases, far from removing Deep Creek from the operation of the mineral leasing law, would constitute a legitimate exercise of the discretion granted to the Interior Secretary under that statute. We affirm the district court's holding that the agencies failed to give the no action alternative meaningful consideration and thereby violated NEPA.

CONCLUSION

The defendant agencies violated NEPA by issuing non-NSO leases on Deep Creek without preparation of an EIS, and by issuing any leases at all on Deep Creek without adequate consideration of the no action alternative. They violated the ESA by issuing the leases without preparation of a comprehensive biological opinion which assesses the effects of leasing and post-leasing activities on threatened and endangered species in the Deep Creek area.

The proper remedy for substantial procedural violations of NEPA and the ESA is an injunction. *Thomas,* 753 F.2d at 764. The district court's opinion declared that "the actions of the defendant agencies, allowing the issuance of oil and gas leases in the Deep Creek Area, are HEREBY SET ASIDE. The defendant agencies are enjoined from making further recommendations to lease and issuing leases pending compliance with NEPA, agency regulations, and the ESA." The parties have raised some question as to the effect and appropriateness of the district court's order. In *Conner,* we found similar language to be unclear and undertook to clarify the order. 836 F.2d at 1541. Here we face an additional factor not present in *Conner,* namely the agencies' failure to consider the no action alternative. Under these circumstances we prefer to remand the action and allow the district court the first opportunity to clarify its order and to determine the specific steps to be taken with respect to the various Deep Creek leases. In doing so, the district court shall consider our decisions in this case and in *Conner,* as well as our recent opinions in *Northern Cheyenne Tribe v. Hodel,* 842 F.2d 224 (9th Cir. 1988), and *Save the Yaak Committee v. Block,* 840 F.2d 714 (9th Cir. 1988).

Pending the district court's clarification of its order, we enjoin all activities on Deep Creek lands conducted under the provisions of the Deep Creek oil and gas leases, and enjoin the sale of any additional leases on Deep Creek, until all statutory requirements are met.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

BOB MARSHALL ALLIANCE, et al.,	)	
Plaintiffs,	)	*NO. CV-82-015-GF*
vs.	)	*MEMORANDUM*
JAMES G. WATT, et al.,	)	*AND ORDER*
Defendants.	)	

(Filed May 27, 1986)

The plaintiffs, Bob Marshall Alliance and the Wilderness Society, bring this action pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4331-4332, and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 153 *et seq.*, challenging the defendant United States Department of Interior's decision not to prepare an Environmental Impact Statement ("EIS") prior to leasing certain land within the National Forest System, *i.e.*, the Deep Creek/Reservoir North Further Planning Area ("Deep Creek Area"), for the purpose of allowing exploration for oil and natural gas. Jurisdiction over the subject matter of this controversy vests in this court pursuant to 28 U.S.C. § 1331.

The matter is presently before the court on cross-motions of the parties requesting the court to enter summary judgment in their respective favors. Because the court concludes that the decision of the defendants not to prepare an EIS was unreasonable, the court finds it appropriate to enter judgment in favor of the plaintiffs.

I. *FACTUAL BACKGROUND*

The Deep Creek Area, comprising about 42,000 acres of the Lewis and Clark National Forest, is a rugged, remote and scenically varied terrain which forms a portion of the Rocky Mountain Front. A dramatic series of deep escarpments and parallel valleys separates the Rocky Mountains from the northern high plains. Ridges within the area reach elevations of about 8,500 feet, while valley bottoms lie generally about 4,500 feet above sea level. The Area is bounded on the west by three contiguous, congressionally designated, wilderness areas, specifically the Bob Marshall, the Scapegoat and the Great Bear Wilderness Areas, which cover a combined area of approximately 1,482,000 acres. On its east side, the Deep Creek Area abuts three Bureau of Land Management wilderness study areas.

The geology of the Area offers spectacular scenery. The eastern faces of the parallel north-south trending ridges are vertical fault scarps of grey-white Madison limestone, the tops of which tower as much as 4,000 feet above the surrounding valleys. Castle Reef and Chute Mountain on Deep Creek's eastern edge, facing the Northern Plains, are visible from the prairie for dozens of miles. The area is bordered on the western side by ridges which slope deeply down to the narrow stream bottoms.

Among the numerous species of wildlife endemic to the Deep Creek Area are Rocky Mountain Bighorn sheep, elk, mule and white-tailed deer, black bear, moose, mountain goat and mountain lion. While not admitted by the Government, the plaintiffs submit that it is generally

believed that the Deep Creek Area provides critical habitat for the grizzly bear, the gray wolf, the peregrine falcon and the bald eagle, all of which are threatened or endangered species. Along with the wilderness complex it borders, the Deep Creek Area may well support a large portion of the entire grizzly population of the contiguous 48 states.

The Deep Creek Area is laced with several streams with significant sport fishery value. Those streams, which include the North and South Forks of Deep Creek, possess a pristine water quality.

Recreational use of the Deep Creek Area by local residents and permittees at nearby Forest Service cabins, commercial outfitters, visitors staying at camp grounds or camping in the back country, and visitors staying at guest ranches in the area is substantial.

The unique geological and ecological attributes of the Deep Creek Area account for the area's receiving a perfect wilderness attribute rating in the Forest Service's Roadless Area Review and Evaluation ("RARE II").[1] Nonetheless, because of the area's undetermined oil and

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[1] Rare II was a programmatic evaluation of the 62 million acres of roadless areas in the National Forest System. Each roadless area was allocated to one of three planning categories: Wilderness, Further Planning, and Non-Wilderness. Areas allocated to the Wilderness category were recommended for inclusion in the National Wilderness Preservation System. Areas allocated to the Further Planning category are to be protected pending completion of unit management plans which would consider whether to recommend the area for Wilderness classification.

natural gas potential, the Forest Service's Rare II decision assigned the area to the Further Planning category, rather than the Wilderness category. Having been designated a Further Planning Area, Deep Creek was made available for all uses permitted under applicable land use plans, provided it was managed so as to preserve suitability for potential Wilderness designation at a later date.

Upon receiving numerous applications for oil and natural gas leases within the Deep Creek Area, the Bureau of Land Management ("BLM") requested the Forest Service to analyze the impacts of oil and gas exploration and development on the environment of the Deep Creek Area, and make recommendations concerning the propriety of allowing leases for exploratory purposes. In January of 1981, the Regional Forester of Region I of the National Forest System recommended that the BLM lease the entire acreage of the Deep Creek Area for oil and gas exploration and development. The Regional Forester's recommendation was made prior to the preparation, and without the benefit of, any EIS. The Regional Forester simply concluded that the issuance of the oil and gas leases would have no significant adverse effects on the human environment, thereby obviating the need for an EIS.

In February of 1981, the plaintiffs, pursuant to 36 C.F.R. § 211.19, appealed the Regional Forester's recommendation to the Chief of the Forest Service. The plaintiffs' appeal was denied, and the decision of no "significant impact" affirmed by the Chief of the Forest Service in May of 1981. Their administrative remedies before the Department of Agriculture exhausted, the plaintiffs filed a protest with the Montana state office of

the BLM, requesting that entity not to follow the recommendation of the Forest Service. The plaintiffs' protest, however, was dismissed by the Director of the BLM. The Secretary of the Interior, through his Assistant Secretary, affirmed the decision of the BLM Director. In January, 1981, the BLM, under authority of the Mineral Leasing Act of 1920, 30 U.S.C. § 226, began issuing leases for the purpose of oil and gas exploration within the Area. Sixteen leases have been issued for the Area.

The plaintiffs instituted the present action, pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, to obtain judicial review of the Secretary's decision to lease the Deep Creek Area. The plaintiffs contend the decision violates the mandates of NEPA, the mandates of the ESA, and the Forest Service's regulations regarding activity within further planning areas.

II. *ANALYSIS*

A. *Standard of Review.*

The Court of Appeals for this Circuit has consistently held that an agency's determination that a particular project does not require the preparation of an EIS is to be upheld unless unreasonable. *Foundation for North American Wild Sheep v. United States*, 681 F.2d 1172, 1177 (9th Cir. 1982); *Portela v. Pierce*, 650 F.2d 210, 213 (9th Cir. 1981); *City and County of San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980). As noted by the court in *Foundation for North American Wild Sheep*, the decision to prepare an EIS is not a matter committed to the particular agency's descretion. 681 F.2d at 1177, n.24. Consequently,

the "arbitrary and capricious" standard normally applicable to reviewing an agency's discretionary decisions, is inapplicable to agency actions falling within the purview of NEPA. *Id.* The mandatory nature of NEPA's directive that an EIS must be prepared for actions that may significantly affect the quality of the human environment renders the "reasonableness" standard the appropriate standard of review. *Id.*

B. *The NEPA Claims.*

By its terms, NEPA mandates the preparation of an EIS for all "major federal actions significantly affecting the quality of the human environment . . . ," NEPA § 102(2) (C), 42 U.S.C. § 4332(2) (C). *See also, Kleppe v. Sierra Club,* 427 U.S. 390, 399 (1976). The broad scope of NEPA represents a firm congressional mandate directing agencies to consider environmental factors on an equal basis with other, more traditional, concerns, prior to taking action. *Foundation for North American Wild Sheep v. United States,* 681 F.2d at 1177.

The plaintiffs assert two distinct NEPA claims. First, the plaintiffs contend that the decision to issue oil and gas leases in the Deep Creek Area constitutes a major federal action significantly affecting the quality of the human environment, which requires the preparation of an EIS. 42 U.S.C. § 4332(2) (C) (i). Second, the plaintiffs maintain that because NEPA requires agencies to consider reasonable alternatives to a contemplated federal action, a "no-leasing" alternative was reasonable and should have been considered. 42 U.S.C. § 4332(2) (E).

(1) *Major Federal Action*

In analyzing the merits of a NEPA claim, the courts must heed NEPA's broad scope in forcing agencies to be actively aware of environmental concerns. "The statutory phrase 'actions significantly affecting the quality of the environment' is intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n.*, 481 F.2d 1079, 1088 (D.C. Cir. 1973). The prescriptions of NEPA require an agency to prepare an EIS for all proposals which may significantly affect the quality of the human environment. In that regard it has been stated:

> The standard for determining whether the implementation of a proposal would significantly affect the quality of the human environment is whether "the plaintiff has alleged facts which, if true, show that the proposed project *may* significantly degrade some human environmental factor". *Columbia Basin Land Protection Ass'n. v. Schlesinger*, 643 F.2d 585 at 597 (9th Cir. 1981) (emphasis in original). *See also, City and County of San Francisco v. United States*, 615 F.2d at 500; *City of Davis v. Coleman*, 521 F.2d at 673; *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973) (Emphasis Supplied).

Foundation For North American Wild Sheep v. U.S., 681 F.2d at 1177-78.

Consequently, this court must determine if "substantial questions" are raised with respect to whether the Deep Creek Area leases may have a significant effect

upon the human environment. If such questions are raised, the defendants' failure to prepare an EIS violated NEPA. *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985); *Foundation For North American Wild Sheep*, 681 F.2d at 1178.

The Forest Service prepared an Environmental Assessment ("EA") for the proposal to lease the Deep Creek Area. The analysis conducted resulted in a Finding of No Significant Impact ("FONSI"). After listing the alternatives purportedly considered, the EA concluded by recommending that surface occupancy in the Deep Creek Area on slopes less than 40 percent in grade be allowed, provided the leases contained certain restrictive stipulations which would serve to mitigate, to a certain extent, the environmental degradation caused by oil and gas exploration activities. These mitigating measures, in turn, would be followed by site-specific assessments based upon individual proposals from lessees. The Forest Service determined that the environmental effects would be subject to the scope of activities proposed for a specific site and that further assessments, or, perhaps, an environmental impact statement, would be conducted at a point in time when the analyses would be more meaningful, because the extent of the lessees' proposed activities would be known. The defendants took and maintain the position that the act of leasing alone does not result in environmental degradation, a fact which obviates the need for an EIS at the leasing stage. Moreover, the defendants submit, individual, staged, assessments of the effects of oil and gas activities is an acceptable method of procedure under NEPA.

(a) *Stipulations.*

Citing *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears, et al. v. Peterson,* 685 F.2d 678 (D.C. Cir. 1982), the defendants assert that an agency may consider mitigation measures that reduce environmental impacts to a minimum when determining whether an EIS is required:

> If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impact stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required.

685 F.2d at 682.

The plaintiffs do not dispute the proposition of effective mitigation, but contend that the measures established by the stipulations in the leases at issue would not serve to "completely compensate for any possible environmental impacts." The court agrees. In that regard, the EA prepared for the Deep Creek Area concludes that exploration activities alone, assuming no commercial development or production takes place, will substantially impair the wilderness character of Deep Creek for a period of 3 to 20 years and would reduce Deep Creek's wilderness rating from a perfect 28 to a mediocre 19.

One protective stipulation, covering 75% of the leased Deep Creek Area, which is of particular importance, is the No Surface Occupancy ("NSO") restriction. The NSO restriction prohibits any activity in the particular leased area. The NSO stipulation, however, should not be used to circumvent the requirement of preparing an

EIS. *Conner v. Burford*, 605 F.Supp. 107, 108 (D. Mont. 1985).

The federal defendants have not asserted that their environmental concerns for the Deep Creek Area are resolved by the protective stipulations and the completion of the Deep Creek Area EA. They anticipate further review and analysis based on specific proposals from lessees.

(b) *Multi-Stage Analysis.*

Asserting the propriety of environmental analysis in stages, defendants place special emphasis upon the rationale of *Sierra Club v. Hathaway*, 579 F.2d 1162 (9th Cir. 1978). In *Hathaway*, the BLM prepared an Environmental Analysis Record on the Alvord Desert Geothermal Leasing Program and determined that preparation of an EIS was not necessary. The BLM issued leases which permitted only "casual use", a term defined by regulation which does not include activities off existing roads. 579 F.2d at 1165, n.4. The Deep Creek Area is, of course, a roadless area, and oil and gas exploration will involve substantial off road activities resulting in appreciable environmental degradation.

The defendants also rely on the holding of the Second Circuit Court of Appeals in *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2nd Cir. 1977), *cert. den.*, 434 U.S. 1064 (1978), wherein that court held that it would be a "meaningless exercise" to attempt to project possible consequences of future, and uncertain, oil pipeline projects. In *County of Suffolk*, the court stated that the rule of reason in determining whether environmental

analysis has been sufficient to comply with NEPA depends on two factors: (1) whether obtaining more detailed information of the topic under consideration is "meaningfully possible" at the time and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project. 562 F.2d at 1378. With respect to the Deep Creek Area, the defendants claim that it is neither meaningfully possible nor important to obtain more detailed information unless and until site specific proposals from lessees create a need for more information.

In *State of California v. Block,* 690 F.2d 753 (9th Cir. 1982), the Ninth Circuit Court of Appeals found that the Forest Service had violated NEPA by designating certain roadless areas under RARE II as "Non-Wilderness" without sufficient site-specific environmental analysis. Non-Wilderness designation precluded the areas from consideration for inclusion in the National Wilderness Preservation System for 10 to 15 years. The court found that the Forest Service's plan to respond to specific development proposals with further site-specific environmental studies was ineffective because:

> [T]he 'critical decision' to commit these areas for nonwilderness uses, at least for the next ten to fifteen years, is 'irreversible and irretrievable'. The site specific impact of this decisive allocative decision must therefore be scrutinized now and not when specific development proposals are made.

690 F.2d at 763.

The defendants, in the case at bar, seek to impress upon the court that the scope of the Deep Creek Area project is such that it is not conducive to site specific

analysis until individual applications for development are proposed. Specific analysis is required by NEPA, however, before the "critical decision" is made.

> Although the agency does have discretion to define the scope of its actions, *Block*, 690 F.2d at 765, such discretion does not allow the agency to determine the specificity required by NEPA.

City of Tenakee Springs v. Block, 778 F.2d 1402 (9th Cir. 1985).

The court concludes that it is not only meaningfully possible and important to discover the site specific consequences on the human environment of the Deep Creek Area before the critical agency decision is made, but NEPA mandates that course of action.

The "critical decision" for the Deep Creek Area is the decision to issue oil and gas leases in the first instance. The Ninth Circuit Court of Appeals, in *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), recently had occasion to elucidate when an EIS must address subsequent phases. In *Thomas*, the court held that road construction associated with timber sales was a connected action and must be studied in a single EIS. The court stated:

> In *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974), we addressed the issue of when subsequent phases of development must be covered in an environmental impact statement on the first phase. We stated that an EIS must cover subsequent stages when 'the dependency is such that it would be irrational, or at lease unwise, to undertake the first phase if subsequent phases were not also undertaken.' *Id.* at 1285.

753 F.2d at 759.

The first step in the oil and gas leasing process is obviously the issuance of the leases themselves. It would undoubtedly be "irrational, or at least unwise" to undertake a leasing program, if exploration and ultimate development were not only contemplated but possible. As the Ninth Circuit found in *Cady v. Morton,* 527 F.2d 786 (9th Cir. 1975), a lessee's capital investments and contractual commitments are relevant to a determination of the interdependence of staged activities. 527 F.2d at 795.

(c) *Cumulative Effects.*

The rationale of *Cady v. Morton, supra,* is pertinent to the other crucial issue presented in the case *subjudice, i.e.,* cumulative effects. In *Cady,* the court stated:

> . . . [I]t cannot be denied that the environmental consequences of several strip mining projects extending over 20 years or more within a tract of 30,786.45 acres will be significantly different from those which accompany [the single lessee's] activities on a single tract of 770 acres.

527 F.2d at 795.

The cumulative effects of several oil and gas operations in the Deep Creek Area will be "significantly different" than those of a single operation upon any one of the subject leases. "Obviously a comprehensive analysis of cumulative impacts of several oil and gas development activities must be done before a single activity can proceed." *Conner v. Burford,* 605 F.Supp. at 109; *see also, Trout Unlimited v. Morton,* 509 F.2d 1276 (9th Cir. 1974). In that regard, "significantly" is defined by the Council on Environmental Quality to include the severity of the impact. A

factor to be utilized in determining the severity in any cumulative impacts situation, is stated as follows:

> [w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

40 C.F.R. § 1508.27(b) (7).

The foregoing conclusion is in accord with the unassailed principle that an EIS must be prepared at an early stage in the project's planning process in order to assure that the environmental impacts will be considered in the decision making process. The necessity for preleasing analysis of potential cumulative effects is clear, where the decision taken by the agencies is an irretrievable choice "between the two competing and mutually exclusive demands of wilderness use and development." *California v. Block,* 690 F.2d 753, 767.

The United States Supreme Court has interpreted the mandate of NEPA to require federal agencies to take a "hard look" at the environmental consequences of their decisions. *Kleppe v. Sierra Club,* 427 U.S. at 410 n.21. Review of the Deep Creek Area project reveals the agencies' intent to take a delayed look at the environmental consequences which may flow from oil and gas exploration and development in the Area. The defendants have initiated a pattern of procrastination, not examination, of environmental concerns. *Foundation for North American Wild Sheep v. U.S.,* 681 F.2d at 1181; *Jette v. Bergland,* 579

F.2d 59, 63 (10th Cir. 1978). In *Foundation for North American Wild Sheep*, the Ninth Circuit Court of Appeals stressed that procrastination by the federal agencies with respect to environmental concerns is foreclosed by NEPA. 681 F.2d at 1181. In that case, the court concluded that the Forest Service's determination that the subject road would be closed, in the event of a forty percent reduction in the use of the area by the affected sheep, represented "an agency decision to act now and deal with environmental consequences later." *Id.* The forty percent figure used by the agency in *Foundation for North American Wild Sheep* is coincidentally analogous to the present defendants' use of a forty percent grade in slope as the threshold for the limit of leasehold surface occupancy. The conclusion that damage to the environment will not occur at slopes less than forty percent is not supported in the record.

The defendant agencies violated NEPA by failing to prepare an EIS for the Deep Creek Area oil and gas leasing program. Later site specific analysis and protective stipulations simply do not comply with NEPA's comprehensive mandate to make early informed decisions and research cumulative effects of major proposed actions.

(2) *The No Leasing Alternative.*

NEPA requires that agencies set forth alternatives to a proposed action. An integral part of an EIS is the discussion and consideration of alternatives. 42 U.S.C. § 4332(2)(C)(iii). 42 U.S.C. § 4332(2)(F) requires agencies to "study, develop, and describe appropriate alternatives

to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." In the case at bar, the plaintiffs assert that the defendant agencies failed to sufficiently analyze the alternative of denial of all leases in order to preserve the Deep Creek Area for possible future wilderness designation by Congress.

The defendant agencies claim that the no-leasing alternative was considered, but that current policy, as reflected in provisions 2822.14b and 2822.46 of the Forest Service manual, required the decision to reject all leases to be based on "identified unacceptable and unavoidable conflicts with surface uses and resources." Because the EA did not find the "unavoidable conflicts," the defendants submit the no-leasing alternative was properly rejected. The plaintiffs, however, contend that the decision of the Secretary of Interior to lease the Deep Creek Area, based on the recommendations of the Forest Service and the BLM was defective because the agencies concluded that they could not base a decision to reject leases on wilderness preservation alone. The position asserted by the Secretary, to the effect that the Secretary is divested of the discretion to refuse to issue leases solely to protect wilderness characteristics, is, the plaintiffs submit, based on fatally flawed logic.

This court recognizes the broad scope of an agency's duty to study all reasonable alternatives. Appearing twice in the text of NEPA, the duty is more pervasive than the duty to prepare an EIS. *See, State of California v. Bergland*, 483 F.Supp. 465, 488 (E.D. Cal. 1980), modified on appeal, *sub nominee, State of California v. Block, supra*. In the context of the Deep Creek Area leases, the agencies

erred by failing to prepare an EIS which developed alternatives. The alternatives discussed must include the no-leasing alternative. With the knowledge that oil and gas activities will potentially preclude wilderness preservation for at least a generation and, therefore, wilderness designation:

> . . . the promise of a site specific EIS in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development.

California v. Block, 690 F.2d 753 at 762, 763 (9th Cir. 1982).

The analysis of the wilderness preservation/no leasing alternative is necessary at a time when that alternative is still viable, a time which is limited to the pre-leasing stage. Contrary to the assertion of the defendant agencies, the mere listing of the no-leasing alternative without any meaningful consideration, will not suffice to satisfy the mandate of NEPA.

C. *Regulatory Violations.*

The plaintiffs contend that by leasing the Deep Creek Area without an EIS the defendant agencies violated their own regulations. The preparation of the Deep Creek Area EA and its Finding of No Significant Impact, the agencies submit, satisfy the requirements of their regulations. The court rejects the defendants' position.

The Forest Service's regulations, which are identical to those promulgated by the Council on Environmental Quality, require the preparation of an EIS for the Deep Creek Area leasing. 40 C.F.R. § 1508.27(b) lists several factors to be utilized in determining the intensity of an action's impact on the human environment. Included in

the list is the degree to which the effects on the quality of the human environment are likely to be highly controversial, and the cumulative effect of several oil and gas development activities. 40 C.F.R. § § 1508.27(b)(4) and (7). The effect on the Deep Creek Area which would be occasioned by oil and gas exploration and development is a highly controverted issue.

An agency is bound by the terms of its own regulations. *Foundation for North American Wild Sheep v. U.S.*, 681 F.2d at 1182. Therefore, to the extent that the Forest Service failed to reach a finding of significant impact and failed to prepare an EIS, it violated its own regulations.

D. *The Endangered Species Act.*

Finally, the plaintiffs assert the defendant agencies violated the Endangered Species Act by failing to gather species and habitat data sufficient to make an informed biological assessment of the effects of leasing the Deep Creek Area.

Under the ESA, all agencies must ensure that their actions are not "likely to jeopardize the continued existence of any endangered species, or threatened species, or result in the destruction or adverse modification" of the cultural habitat of such species. 16 U.S.C. § 1536(a)(2). In order to effectuate this mandate with respect to the Deep Creek Area, the Forest Service consulted with the Fish and Wildlife Service which, in turn, conducted a biological assessment to determine the existence of threatened or endangered species in the Deep Creek Area. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.04. The Fish and Wildlife Service found that four species protected by ESA, *i.e.*, the grizzly

bear, the gray wolf, the peregrine falcon, and the bald eagle, were known to use, or have essential habitat in, the Deep Creek Area, although their presence or absence was not conclusively determined. The issuance of oil and gas leases, however, was found not likely to jeopardize these species or their cultural habitat. The biological opinion that the Deep Creek Area leasing would not violate ESA was limited to lease issuance because data and information for all stages of activity was obviously not available. The agencies take the position that further study will be conducted on the effects of each step of the oil and gas development process as they arise.

The plaintiffs submit that the BLM did not make an informed decision with respect to ESA's mandates. In support of their contention, the plaintiffs cite language from the letter of the Fish and Wildlife Service pertaining to the Deep Creek Area, which warns of conflicts where insufficient investigation occurs:

> Leasing with little or no information on key habitat components and use patterns for the listed species in the Deep Creek Area is setting the stage for possible future conflicts between energy development and the conservation of endangered and threatened species. Early identification of the potential conflict areas so that sound planning on a regional basis can be initiated would provide a more positive approach.

The leading ESA case, *TVA v. Hill*, 437 U.S. 153 (1978), strictly construed the language of the Act in enjoining the 80% complete Tellico Dam Project after the discovery of the endangered snail darter.

> The pointed omission of the type of qualifying language previously included in endangered species

> legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies.

437 U.S. at 185.

Clearly the "primary missions" of oil and gas exploration and development must give way to affirmative investigation of "potential conflict areas." Defendants claim the *TVA* facts are substantially different in that the snail darter and its habitat faced certain eradication. The intent of ESA and the principles of *TVA*, cannot, however, be so narrowly construed. The Supreme Court in *TVA* clearly expressed the broad mandate to preserve species, citing the interpretation of Representative Dingell, House anager of the bill, of the mandatory nature of § 7:

> Another example . . . [has] to do with the continental population of grizzly bears which may or may not be endangered, but is surely threatened . . . Once this bill is enacted, the appropriate Secretary, whether of Interior, Agriculture or whatever, *will have to take action*, to see that this situation is not permitted to worsen, and that these bears are not driven to extinction. The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that those purposes are carried out. . . . [T]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.* 119 Cong.Rec. 42913 (1973). (Emphasis supplied.)

437 U.S. at 183, 184.

The agency planning process is the time frame for which NEPA and ESA have their most efficient consequences. We need not proceed to 80% completion of a

major oil and gas development project only to force termination due to discovery of the destruction of threatened and endangered species or their cultural habitat. The defendants seek court approval of an ESA compliance scheme of responding to specific activity proposals and enforcing restrictive stipulations where threats arise. This court, bound by the priority of ESA over the primary missions of the agencies, cannot approve such a plan of action. Defendants assert that their assessment encompasses "the best scientific and commercial data available" and that, therefore, their investigation is sufficient. 16 U.S.C. § 1536(a)(2). The agency, however, cannot propose a project so expansive and comprehensive as the Deep Creek Area leasing project, and then claim that the "available" data is sufficient. The Fish and Wildlife Service's suggestions of "early identification" and "sound planning on a regional basis" are good advice, advice which is more formally expressed in *TVA v. Hill, supra,* and the ESA itself.

The agency is also required to conserve threatened and endangered species to the extent that they are no longer threatened and endangered. *Carson-Truckee Water Conservancy District v. Clark,* 741 F.2d 257 (9th Cir. 1984). "The plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost." *TVA v. Hill,* 437 U.S. 153, 184 (emphasis added).

III. *CONCLUSION*

In *Conner v. Burford,* 605 F.Supp. 107 (D. Mont. 1985), this court rejected post-leasing, site-specific environmental assessments as violative of NEPA and post-leasing, site-specific biological assessments as violative of the

ESA. The record in the case *sub judice* compels the same result with respect to leasing in the Deep Creek Area. The cumulative impacts of several separate oil and gas exploration and development activities in the Deep Creek Area have not been properly assessed. As wilderness preservation will no longer be a viable alternative in the Deep Creek Area after oil and gas exploration and/or development begins, neither, certainly, can conservation and promotion of threatened and endangered species.

Therefore, under the provisions of 5 U.S.C. § 706, the actions of the defendant agencies, allowing the issuance of oil and gas leases in the Deep Creek Area, are HEREBY SET ASIDE. The defendant agencies are enjoined from making further recommendations to lease and issuing leases pending compliance with NEPA, agency regulations, and the ESA.

NOW, THEREFORE, IT IS HEREBY ORDERED that defendants' and intervenors' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is GRANTED.

DATED this 27 day of May, 1986.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX C

Mineral Leasing Act
30 U.S.C. 226(a)

§ 226. Lease of oil and gas lands.

(a) Authority of Secretary

All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.

* * *

National Environmental Policy Act
Section 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982)

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 USCS § 552], and shall accompany the proposal through the existing agency review processes;

* * *

Section 104, 42 U.S.C. § 4334 (1982)

§ 4334. Other statutory obligations of agencies

Nothing in Section 102 or 103 [42 USCS §§ 4332, 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Jan. 1, 1970, P. L. 91-190, Title I, § 104, 83 Stat. 854.)

Endangered Species Act
Section 7, 16 U.S.C. 1536 (1982)

16 U.S.C. 1536 (a)(2)

* * *

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. 1536(b)

* * *

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of

this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that –

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection; and

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that –

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, and

(iii) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clause (ii).

(2)

No. 88-905

Supreme Court, U.S.
FILED
JAN 30 1989
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CLERK

In The

Supreme Court of the United States

October Term, 1988

PAUL C. KOHLMAN,

Petitioner,

v.

BOB MARSHALL ALLIANCE, ET AL.,
and
DONALD P. HODEL, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS BOB MARSHALL ALLIANCE, ET AL. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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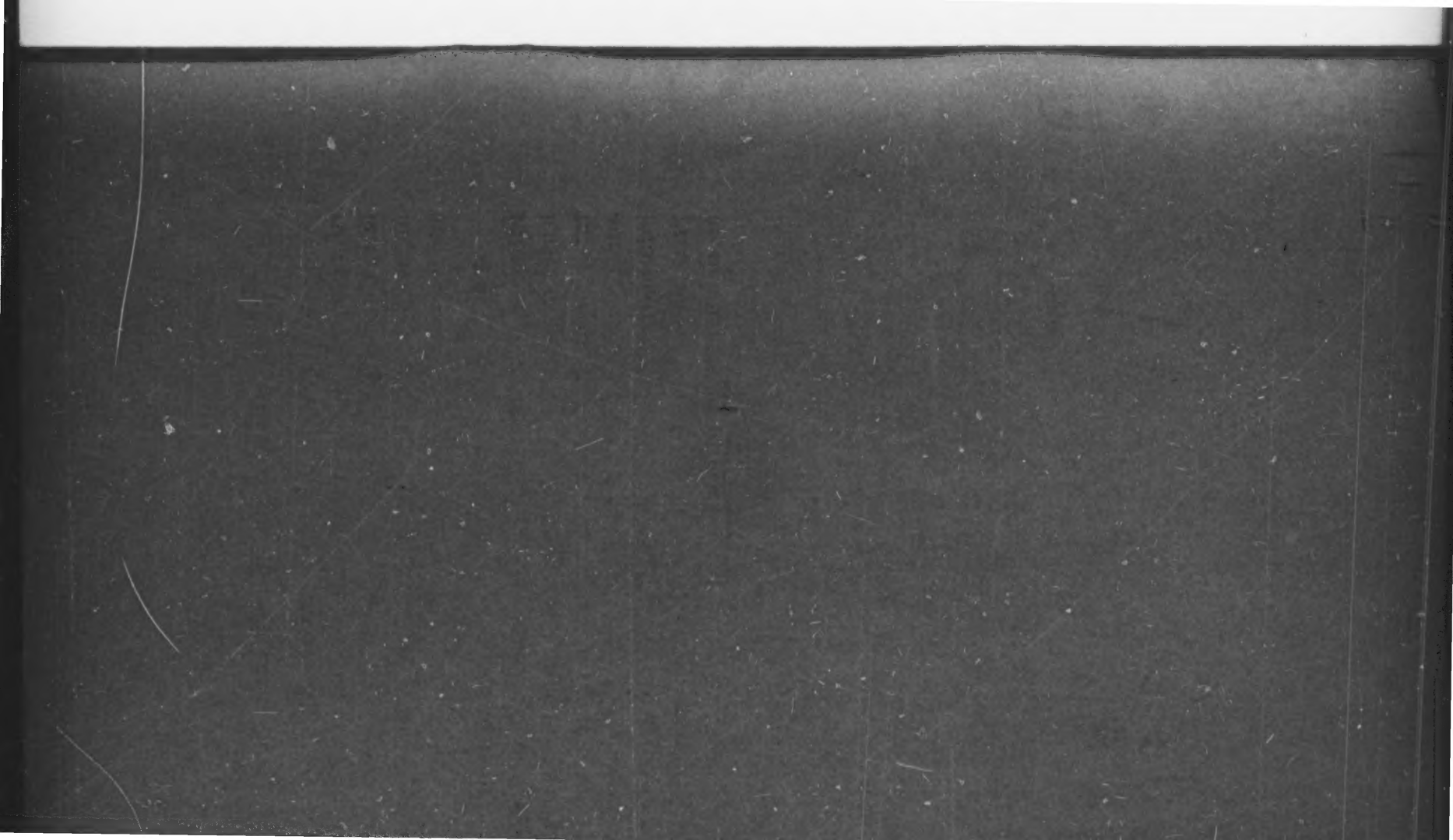

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the ruling of the court of appeals that issuance of oil and gas leases triggers NEPA's requirement for an environmental impact statement unless the leases are subject to a no-surface-occupancy stipulation?

2. Should this Court grant certiorari to review the ruling of the court of appeals that issuance of oil and gas leases triggers the Endangered Species Act's requirement for a comprehensive biological opinion where the Fish and Wildlife Service concludes that leasing without this information "is setting the stage for possible future conflicts between energy development and the conservation of endangered and threatened species"?

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No. 88-905

In The

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PAUL C. KOHLMAN,

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For The Ninth Circuit

BRIEF OF RESPONDENTS BOB MARSHALL ALLIANCE, ET AL. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Bob Marshall Alliance and The Wilderness Society (hereafter collectively, Bob Marshall Alliance) respectfully request the Court to deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Bob*

Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988) (App. 1-19).[1]

RESPONDENTS' STATEMENT OF THE CASE

This case involves the proper application of the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, to the issuance of oil and gas leases. The nineteen leases in question were issued in 1982 by the Bureau of Land Management (BLM) pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.*, in a roadless area known as Deep Creek, located within the Lewis and Clark National Forest in Montana.

The Deep Creek Further Planning Area (Deep Creek) comprises about 42,000 acres of wild and remote, mountainous terrain. It is bounded on the west by three designated wilderness areas aggregating 1,482,000 acres, which are administered by the United States Forest Service (Forest Service), and on the east by three BLM wilderness study areas. App. 21. The geology of the area offers spectacular scenery including a dramatic series of steep escarpments and deep parallel valleys which separate the Rocky Mountains from the northern high plains. *Id.* The eastern faces of the parallel north-south trending ridges are vertical fault scarps of grey-white Madison

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[1] "App." refers to the Appendices to the petition for writ of certiorari filed on behalf of petitioner Paul C. Kohlman. "Resp. App." refers to the Appendix to respondents' brief, filed herewith.

limestone, the tops of which tower as much as 4,000 feet above the surrounding valleys. *Id.* Castle Reef and Chute Mountain on Deep Creek's eastern edge, facing the Northern Plains, are visible from the prairie for dozens of miles. *Id.*

Deep Creek's wildlife resources are extraordinary. It is an important refuge for four threatened or endangered species: the grizzly bear, the gray wolf, the peregrine falcon, and the bald eagle. App. 6, 22. Deep Creek is also home to abundant populations of Rocky Mountain bighorn sheep, elk, mule and white-tailed deer, black bear, moose, mountain goat and mountain lion. App. 7, 21.

Recreational use of Deep Creek by fishermen, hikers, hunters and campers is substantial, due to the proximity of Forest Service campgrounds and cabins, guest ranches and commercial outfitters. App. 22. Several streams with pristine water quality and significant sport fishery value run through the area. *Id.*

Deep Creek also offers the potential for resource development. The area is located in the Overthrust Belt, a geologic zone extending from Canada to Mexico in which major discoveries of oil and natural gas have been made. App. 7.

Between 1977 and 1979 the Forest Service conducted a comprehensive review of 62 million acres of roadless national forest lands pursuant to the Wilderness Act of 1964, 16 U.S.C. §§ 1131 *et seq.*, to determine which areas should be recommended for wilderness designation. App. 7, 22. Through this Roadless Area Review and Evaluation ("RARE II") process, the Forest Service classified areas as either wilderness, nonwilderness, or further

planning. *Id.* Areas allocated to the wilderness category were recommended to Congress for inclusion in the National Wilderness Preservation System. App. 22, fn. 1. Further planning areas are closed to land uses that might reduce the land's wilderness potential, pending the development of management plans which will recommend whether such areas should be included by Congress in the Wilderness System. App. 7.

Because of its outstanding scenic and ecological values, Deep Creek was awarded the highest possible RARE II wilderness rating – a "perfect score" on the Wilderness Attribute Rating System. App. 7, 22-23. Yet due to its potential but undetermined oil and gas resources, Deep Creek was designated a further planning area. *Id.*

Following this designation, BLM received sixteen applications for oil and gas leases on Deep Creek. App. 8. Under an agreement with BLM, the Forest Service prepared an environmental assessment (EA) of Deep Creek and concluded that such leasing would have no significant effect on the quality of the human environment. *Id.;* App. 23. This finding purported to absolve the agencies of the need to prepare an environmental impact statement (EIS) on the sale of the leases. *Id.*

The Forest Service also requested formal consultation with the United States Fish and Wildlife Service (F&WS) under section 7 of ESA, 16 U.S.C. § 1536. App. 8, 38. To that end, the Forest service submitted a biological evaluation (BE) of Deep Creek to the F&WS as required under

ESA and applicable Forest Service and F&WS regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.12-402:14; Forest Service Manual § 2671.44(c). In its BE, the Forest Service admitted that it had failed to gather necessary information about the environmental conditions of the area:

> A field evaluation [of Deep Creek] was not undertaken at this time. [BE, p. 1.][2]
>
> * * *
>
> Specific bear use patterns for the study area are not available . . . . [BE, p. 6.]
>
> * * *
>
> Specific wolf use patterns for the study are are not known. [BE, p. 7.]
>
> * * *
>
> [I]ntensive raptor surveys have not been completed. [*Id.*]
>
> * * *
>
> Specific eyerie locations, or cliff suitabilities for the peregrine falcon have not been identified in the study area . . . . [N]esting attempts could [be] occurring now and not [have been] identified because of the lack of intensive surveys. [BE, p. 9.]

For these reasons, the Forest Service acknowledged that it had

> insufficient resource inventory information at this time to identify specific areas for surface occupancy timing or area restrictions for T&E species considerations. [BE, p. 11.]

Because the Forest Service's BE was inadequate, the F&WS was unable to prepare a comprehensive biological

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[2] Pursuant to Supreme Court Rule 19.1, respondents have requested the district court below to certify and transmit to this Court the Forest Service's Biological Evaluation.

opinion on the potential impacts of lease activities on the protected species which inhabit Deep Creek. App. 8, 38. The F&WS noted this deficiency and warned against the issuance of leases without adequate environmental review:

> Both biological data and project information are lacking for the entire action. Your BE [Biological Evaluation] states that 'there is insufficient resource inventory information at this time to identify specific areas for surface occupancy timing or area restrictions for threatened and endangered species consideration.' Your EA also states that *'it is not possible at this time to identify all important wildlife habitats which would preclude specific lease activities.'* In order to remain in compliance with Section 7(a)(2), *the Forest Service must initiate the necessary research/surveys/inventories to acquire the biological data and obtain biological opinions on each of the incremental steps as they arise.* . . .[F&WS op., p. 4, emphasis added.][3]
>
> * * *
>
> Leasing with *little or no information on key habitat components and use patterns for the listed species* in the Deep Creek area is setting the stage for possible future conflicts between energy development and the conservation of endangered and threatened species. *[Id.,* p. 5, emphasis added.]

The impact of oil and gas exploration on Deep Creek's threatened and endangered species without adequate prior consultation under ESA could well be catastrophic. Eight of Deep Creek's drainages could be

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[3] Pursuant to Supreme Court Rule 19.1, respondents have asked the district court below to certify and transmit to this Court the F&WS biological opinion letter.

roaded, including four of the five best grizzly habitats. BE, pp. 1 and 6. The potential ESA conflicts are extreme:

> Even though only 25% of the study area is suitable for occupancy activities, those areas available for occupancy use are, for the most part, the drainage bottoms which could increase the potential conflict in the higher quality grizzly and wolf habitats. . . . [O]il and gas activity occurring at the same time in adjacent drainages could reduce the solitude, refuge habitat [sic] available to the grizzly or wolf over large areas of the study area. . . . [*Id.*, p. 9.]

> *Stream bottoms are recognized as an extremely important habitat component of the grizzly bear. Despite the Forest Service requirement that riparian habitat be avoided oil and gas activities and its [sic] associated road use certainly has the potential to displace bears from these areas* . . . . [F&WS op., p. 4, emphasis added.]

> The greatest effect associated with oil and gas activities upon the peregrine falcon and bald eagle is the potential to preclude future occupancy of suitable but unoccupied habitat because of associated disturbance activities . . . . All phases of oil and gas activity could preclude peregrine nesting. . . . The greatest potential for conflict [with the Bald Eagle] is along the three potential access corridors which cross the delineated Essential Habitat. . . . [BE, pp. 9-10.]

These very serious risks demanded a prompt and comprehensive biological assessment. As the F&WS observed,

> *[W]aiting until completion of a project specific evaluation to generate the biological data may result in* . . . areas being leased for surface occupancy that in fact have no opportunity for surface occupancy due to *irresolvable conflicts with wildlife resources.*

> Early identification of the potential conflict areas so that sound planning on a regional basis can be initiated would provide a more positive approach.
>
> *[D]ue to the large home ranges of both the grizzly and wolf, identification of their habitat components over a large area is required in order to project use patterns.* The projection of use patterns over a large area is required in order to coordinate the proposed activity and other ongoing activities with the biological requirements of the wolf and bear. . . . *[T]he required information may not be available to accomplish this objective if a "piecemeal" approach of identifying habitat components on individual sites at the time they are proposed is followed.* [F&WS op., pp. 4-5, emphasis added.]

Yet the Forest Service chose a path of procrastination, not examination, of these environmental concerns. App. 33.

Despite its advice that leasing without adequate environmental review would "set the stage" for conflicts with ESA, however, the F&WS reluctantly deferred to the Forest Service's legal position that "leasing" was merely a paper transaction which by itself would not jeopardize the protected species. App. 8, 38; F&WS op., pp. 2-3. But the F&WS made clear that it was not making an informed judgment about the effects of *exploration activities*, but simply acceding to the Forest Service's legal position concerning the effect of "leasing." *Id.*, p.1. Furthermore, F&WS explicitly premised its agreement on the assumption that, to "assure compliance with [ESA] Section 7(a)(2)," the Forest Service would undertake the following studies "prior to the receipt of specific applications for exploration/development permits":

(1) Surveys to determine the use or non-use of the Deep Creek leasing area by bald eagles and peregrine falcons.

(2) Surveys, inventories, or research necessary to identify the key habitat components for listed species in the Deep Creek leasing area.

(3) Identify the use patterns listed species portray in the Deep Creek lease area. [F&WS op., pp. 5-6.]

The F&WS also stressed that these studies

> *should occur prior to leasing* so that the information obtained can be used in the decision making process as to whether an area should be excluded from leasing, leased with 'no-surface occupancy,' or leased with surface occupancy allowed, and which Appendix B stipulations are applicable to the lease. [*Id.*, p. 6, emphasis added.]

But the Forest Service ignored this expert advice.

Commencing in January 1982, BLM issued the sixteen leases for which applications had been received, along with three additional leases awarded through a lottery system. App. 8. Collectively, these leases cover all of the land within Deep Creek. *Id.* Four of the leases contain no surface occupancy ("NSO") stipulations covering the entire leased acreage; some of the others contain NSO stipulations covering part of the leased acreage. App. 11-12. Although the leases contain other kinds of stipulations, only the NSO stipulation purports to empower the government to prohibit any and all lease activities that might significantly affect the environment, the threshold test for preparation of an EIS. Even assuming the NSO stipulations are effective to prevent all surface disturbance absent further agency approval,[4] the Forest Service

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[4] The question whether these NSO stipulations are effective has not been decided by the courts below. The Ninth Circuit remanded this issue for determination by the district court. App. 12, fn. 3.

admits that the non-NSO leases allow surface occupancy activities in eight of Deep Creek's ten drainages. BE, pp. 1, 8.

The impacts of the exploration activities allowed under the leases are severe. Exploration involves construction of roads, drill pads, mud pits and related facilities. Because of the extreme depth (at least 10,000 feet) of the suspected oil and gas deposits, heavy drilling equipment which cannot be transported by helicopter is required. Resp. App. 1. Therefore access roads would be constructed. BE, p. 4. Each drillsite at Deep Creek would be more than double the size of a football field to accommodate the drill rig, mud pit, generators, drill pipe baskets, office and housing trailers, vehicles, stockpiled earth and other support facilities. The Forest Service admits that "at least" fifteen such sites would be constructed. *Id.* Because of the steep and fragile character of the terrain, significant cutting and filling, and resultant scarring of the landscape, would result from these exploration activities. App. 34; Resp. App. 6.

Accordingly, *the Forest Service admits that exploration activities alone, even assuming no commercial development and production takes place, would reduce Deep Creek's wilderness rating from a pristine value of 28 to a mediocre level of 19 points for a period of 3 to 20 years.* App. 28. And if all the lessees undertake exploration, according to the government, "[i]t is unlikely that Deep Creek can be reclaimed to its existing 'natural condition' within 20 years."[5] The

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[5] Interior Secretary James Watt's Answer to Plaintiffs' Request for Admission No. 10, filed January 10, 1983. Pursuant to Supreme Court Rule 19.1, respondents have requested the district court below to certify and transmit to this Court Secretary Watt's responses to respondents' discovery below.

Montana Department of Fish and Game concluded that the proposed exploration roads "would constitute a major threat to wildlife and wilderness values," and that if the exploration allowed by the leases occurs, "the site can never return to the natural landscape." Resp. App. 6.

Less tangible but just as pervasive as the physical alteration of Deep Creek would be the impact of greatly increased human presence in this remote region. An exploratory drill rig requires the services of up to 50 workers on a round-the-clock, seven-days-a-week schedule. According to the F&WS's biological opinion, the continuous human activity resulting from oil and gas exploration of Deep Creek would have the potential to displace the grizzly bear from the area. F&WS op., p. 4.

Because issuance of the subject leases violated NEPA and ESA, in February 1982, following a series of administrative appeals of the Forest Service and BLM lease approvals, Bob Marshall Alliance brought this action. Specifically, Bob Marshall Alliance alleged that NEPA required preparation of an EIS prior to issuance of the leases (42 U.S.C. § 4332(2)(C)); that the defendant agencies failed to "study, develop and describe" the alternative of not issuing leases in order to preserve the wilderness character of the area (42 U.S.C. § 4332(2)(E)); that the leases would impair the wilderness character of Deep Creek in violation of Forest Service regulations; and that the consultation process mandated by ESA had not taken place (16 U.S.C. § 1536). App. 9.

The district court granted summary judgment for Bob Marshall Alliance on May 27, 1986. App. 20-41; *Bob Marshall Alliance v. Watt*, 685 F.Supp. 1514 (D. Mont.

1986). The court held that the leases represented an irretrievable commitment of resources triggering the need for an EIS under NEPA and the Forest Service's regulations; that the agencies violated NEPA by failing to give meaningful consideration to the no-leasing alternative; and that the government had failed to conduct an adequate assessment and consultation regarding the leases' impact on threatened and endangered species. App. 25-41. Accordingly, the court set aside the leases as contrary to law and enjoined the agencies from issuing any further leases in Deep Creek pending compliance with NEPA, ESA and agency regulations. App. 41.

Petitioner Paul C. Kohlman and federal respondents Donald P. Hodel, et al. appealed from the district court's decision. They contended that the leases did not constitute an irrevocable commitment of environmental resources, and therefore NEPA and ESA could be satisfied by a subsequent series of "staged consultations" and environmental reviews tiered to specific exploration and development activities. App. 9-10. The Ninth Circuit affirmed the district court's ruling in large measure, save only those leases which absolutely prohibited surface disturbance in the absence of specific governmental approval – i.e., "NSO leases." App. 12. The appeals court reasoned, consistent with the leading cases on point, *Conner v. Burford*, 848 F.2d 1441, 1446-1451 (9th Cir. 1988) and *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983), that *either the government must retain full authority in the leases to disapprove lease activities based on future environmental reviews, or the required review must take place before the leases are issued.* App. 10-12.

The federal defendants-respondents have accepted the well-reasoned decision of the Ninth Circuit and apparently intend to comply therewith. Of all the governmental and lessee parties to this processing, only one, petitioner Paul C. Kohlman, seeks review by this Court.

REASONS FOR DENYING THE WRIT

There is no basis for granting certiorari in this case. The Ninth Circuit's decision allows staged NEPA review of oil and gas leases and is consistent with the rulings of the other circuits on this issue. The government has therefore decided to comply with the Ninth Circuit's ruling and does not seek this Court's review. Petitioner, by contrast, seeks to evade effective NEPA review of oil and gas leases. Furthermore, there are two independent bases for the Ninth Circuit's decision to set aside the leases which petitioner does not challenge. Therefore no ruling by this Court could revive these leases. Certiorari accordingly must be denied.

In urging this Court to grant certiorari in this case, petitioner portrays the court of appeals' ruling as one that departs from the established principle of "staged" NEPA review adopted by the Tenth, District of Columbia, and Ninth Circuits. Nothing could be further from the truth. The court below *reversed* the district court's refusal to allow staged review, holding that such review was entirely permissible *where the government specifically reserved authority in the leases to disapprove lease activities based on future environmental reviews*. App. 11. The problem with most of the leases in the instant case was that

they did *not* reserve this authority. Rather, the non-NSO leases would curb environmentally harmful activities only to the extent they were "not *necessary* for the full enjoyment" of the lease. In issuing the non-NSO leases, the Interior Secretary was quite explicit on this point:

> Under the general authority contained in section 4 of each lease, and the specific authority contained in the various stipulations, the lessee may be precluded from surface occupancy of some or all of the leased premises *if the proposed surface occupancy is not necessary for the full enjoyment of the right* to drill for, mine, extract, remove and dispose of all oil and gas deposits, except helium gas, in the leased lands, such as through the use of directional drilling from adjacent property owned or controlled by the lessee.[6]

Obviously, if only *un*necessary surface occupancy may be precluded by the government, the lessee is free to engage in all surface occupancy activities which are "necessary for the full enjoyment of the right to drill for, mine, extract, remove and dispose of all oil and gas deposits." Thus, issuance of the non-NSO leases was an irretrievable commitment of environmental resources which triggered the need for an EIS. None of the authorities on which petitioner relies suggests otherwise.

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[6] Interior Secretary James Watt's Supplemental Answer to Plaintiffs' Interrogatory No. 9, filed January 10, 1983, emphasis added. Pursuant to Supreme Court Rule 19.1, respondents have requested the district court below to certify and transmit to this Court Secretary Watt's responses to respondents' discovery below.

Thus contrary to petitioner's claim, there is no "conflict" between the Ninth, Tenth and District of Columbia Circuits over the proper approach to examining the environmental effects of oil and gas leasing. These circuits agree that the timing of EIS preparation on oil and gas leasing is not mechanically determined by application of some preconceived assumptions, as petitioner suggests. Cert. Pet., pp. 6-7. Rather, the circuits hold that the timing of an EIS is determined on a case-by-case basis depending on two factors: (1) *whether the lease approval represents an irretrievable commitment* of resources; and (2), *whether the potential environmental impacts are significant.* If the first factor is absent and the government retains full authority to prohibit future resource impacts, as in the case of NSO leases, then no EIS is necessary even though the second factor is present: the government may defer preparation of an EIS until sufficient data on specific exploration activities is gathered. In the latter case, an EIS is required only at that stage where the government makes an irrevocable commitment of environmental resources.

Thus, in *Bob Marshall Alliance* and *Conner v. Burford, supra,* the Ninth Circuit held no EIS is required for issuance of NSO leases. App. 10-12; 848 F.2d at 1447. The D.C. Circuit reached precisely the same conclusion in *Sierra Club v. Peterson, supra.* Its opinion, in which Justice Scalia of this Court joined, is particularly cogent on this point and is, therefore, quoted at length:

> NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment. The purpose of an EIS is to insure that the agency considers all possible courses of action and assesses the environmental consequences of each

proposed action. . . . Therefore the appropriate time for preparing an EIS is *prior* to a decision, when the decisionmaker retains a maximum range of options. [Citations omitted.] An EIS is required when the "critical agency decision" is made which results in "irreversible and irretrievable commitments of resources" to an action which will affect the environment. [Citation omitted.] On the facts of this case, that "critical time," insofar as lands leased without a NSO Stipulation are concerned, occurred at the point of leasing. Notwithstanding the assurance that a later site-specific environmental analysis will be made, in issuing these leases the Department made an irrevocable commitment to allow *some* surface disturbing activities, including drilling and roadbuilding. While theoretically the proposed two-stage environmental analysis may be acceptable, in this situation the Department has not complied with NEPA because it has sanctioned activities which have the potential for disturbing the environment without fully assessing the possible environmental consequences.

The Department asserts that it cannot accurately evaluate the consequences of drilling and other surface disturbing activities until site-specific plans are submitted. If, however, the Department is in fact concerned that it cannot foresee and evaluate the environmental consequences of leasing without site-specific proposals, then it may delay preparation of an EIS provided that it reserves both the authority to *preclude* all activities pending submission of site-specific proposals and the authority to *prevent* proposed activities if the environmental consequences are unacceptable. If the Department chooses not to retain the authority to *preclude* all surface disturbing activities, then an EIS assessing the full environmental consequences of leasing must be prepared at the point of commitment – when the leases are issued.

> The Department can decide, in the first instance, by which route it will proceed.

717 F.2d at 1414-15, emphasis in original.

Contrary to petitioner's claims, the Tenth Circuit's ruling in *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987) does not conflict with *Bob Marshall Alliance*, *Conner* and *Peterson*. In *Park County*, as in the Ninth and D.C. Circuit rulings, the court focused on the government's reservation of authority to disapprove future surface-occupancy activities. It upheld issuance of an oil and gas lease without prior preparation of an EIS precisely *because* the lease "required [the government's] prior approval . . . before any surface-disturbing actions, such as drilling." 817 F.2d at 613. And indeed, an EIS was prepared on the drilling permit issued on that lease. *Id.*

In summary, petitioner's contention that the ruling below is out of step with established NEPA principles is not supported by the very decisions on which petitioner relies. To the contrary, it is plain that the Ninth Circuit's ruling is not only correct under the facts of this case, but squarely in the mainstream of NEPA law.

It is equally plain that petitioner's agenda has nothing to do with promoting careful and responsible resource decisionmaking. Petitioner's real agenda is to immunize oil and gas lease activity from NEPA review, for petitioner urges not only that initial lease issuance be exempt, but also that all subsequent permitting activity be exempt as well. It complains that even where an EIS is not required before leasing – as where an NSO stipulation

is included – under the Ninth Circuit's ruling the lessee would be burdened by post-lease NEPA review:

> Under this procedure [upheld in *Bob Marshall Alliance*], the Ninth Circuit found that the government could issue the lease without an EIS; but it must retain the right to prohibit all surface disturbing activity. *Id.* Future decisions would allow or disallow surface disturbing actions, and EISs must accompany those decisions. *In effect, each time the lessee applied for a permit he would risk losing his lease.*

Cert. Pet., p. 10, emphasis added.

Petitioner cannot have it both ways. NEPA requires that lease activities be reviewed – and possibly disapproved – either before lease issuance, or at the post-lease, permitting stage. Petitioner has no right to engage in oil and gas leasing activities on federal land without subjecting itself at *some* point to the environmental reviews and discretionary approvals mandated by Congress. Because petitioner urges otherwise, its position is without merit. Therefore, its petition should be denied.

There are several other, equally compelling reasons to deny petitioner's request for certiorari. First, the very government agencies whose lease decisions were set aside have decided not to seek review of the Ninth Circuit's decision, and have elected instead to conform their leasing practices to the court's well-reasoned, fair and sensible approach. No purpose would be served by unsettling their decision to follow what has been mainstream NEPA law for many years.

Second, there is an independent basis for the Ninth Circuit's decision to set aside the subject leases which petitioner does not challenge. The court below held that

the government had a statutory duty, pursuant to Section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), to "study, develop and describe" alternatives to leasing. This duty is entirely independent from the EIS requirement of Section 102(2)(C), 42 U.S.C. § 4332(2)(C). App. 13-17. This duty arises where recommended actions "involve[] unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The Deep Creek leases pose such conflicts, for as the Ninth Circuit noted, "the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or the statutory mandate beomes ineffective." App. 16, fn. 4. Because the government failed to consider meaningfully the no-leasing alternative, all of the subject leases were set aside. Petitioner does not challenge this ruling, and is therefore bound by it. No ruling by this Court can revive these leases. Petitioner's request for ceritiorari must therefore be denied.

Finally, the government's compliance with ESA is admittedly deficient. The Forest Service conceded that it had failed to gather essential information concerning the threatened and endangered species which inhabit Deep Creek. See discussion on pages 5-6, *supra*. The F&WS agreed that the Forest Service's Biological Evaluation was inadequate. See discussion on pages 6-9, *supra*. Agency failure to prepare an adequate biological evaluation is a "substantial procedural violation of ESA." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). Because of this failure, all of the subject leases were set aside. No ruling by this Court can cure this fatal deficiency, and resurrect these leases. Petitioner's request for certiorari must therefore be denied.

In sum, there is no reason for this Court to exercise its review powers in this case and certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: January 30, 1989

Respectfully submitted,

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(415) 567-6100

Attorney for respondents
Bob Marshall Alliance and
The Wilderness Society

U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, "ENVIRONMENTAL ASSESSMENT, OIL & GAS LEASING: DEEP CREEK AND RESERVOIR NORTH RARE II FURTHER PLANNING AREA"

7. *EFFECTS OF IMPLEMENTATION*

This section describes consequences of implementing each alternative in terms of environmental changes, outputs and costs.

a. *Givens and Assumptions*

The following givens and assumptions were used in the analysis process.

Givens

1) Leasing would be subject to Standard Stipulations and the RARE II Further Planning Area Stipulation (Appendices A and B).

2) All activity proposals that may result in environmental disturbance will be analyzed through the NEPA process.

Assumptions

1) Discovery would be of natural gas and possibly minor amounts of oil.

2) Any hydrocarbon reservoirs are probably deeply buried (at depths of 10,000 feet or more).

3) At this time it is not possible to drill a wildcat well to depths of 10,000 feet or more without road access. (This is because of the size and weight of equipment used in drilling "deep holes".)

4) Directional drilling beneath "inaccessible" terrain is of very limited feasibility (generally no more than one half mile) because of the complex geological structures involved.

5) Roads will be designed for dry season and single purpose use. Should the lessee desire to use the roads during wet weather, increased levels of maintenance and spot surfacing may be required for resource protection.

6) Exploration road locations will be evaluated with consideration for further road development and improvement should production be approved by subsequent analysis. (Such improvements may be required by production to extend road utility beyond the dry season.)

Resp. App. 3

STATE OF MONTANA

Department of
Fish and Game

Rural Route 4, Box 2
Great Falls, Montana 59405
July 3, 1980

Mr. Darrol Harrison
Acting Forest Supervisor
Lewis & Clark National Forest
P.O. Box 871
Great Falls, Montana 59403

Dear Darrol:

On December 17, 1979 we expressed our concerns to the Lewis and Clark National Forest relating to management direction for oil and gas leasing in the Deep Creek and Reservoir North area. Because of the number and importance of the issues we recommended that an Environmental Impact Statement be prepared. We still feel that anything short of an EIS is inappropriate and violates the intent of NEPA.

We have reviewed the Environmental Assessment and find that it contains contradictions and leaves a number of important questions unanswered.

According to the Lewis and Clark's own assessment and figures, the existing values for wilderness and wildlife are considerably higher than the *potential* for natural gas.

The conclusion that the construction of new roads in the area will not alter its wilderness potential is refuted

by your own data in Appendix 1 which computes "Wilderness Attribute Ratings" before and after roading.

On page 69 under "Effects on Wilderness" it is stated that areas affected by road construction would be limited to where you can "revegetate it with native species." This is directly in conflict with 6(c) and on page 50 where you talk about "seeding with adapted grasses, forbs, and deep-rooted native shrubs," and "a combination of grass, forb, and native shrub and tree species."

On page 3, you conclude that "lease issuance in a further planning area is an action which does not directly result in effects on the environment." This is obviously contrary to a recent court decision of a Beaufort Sea case in which the judge decided that all activities that occur as a result of the lease should be dealt with in an EIS.

In a recent decision relating to water developments in Wyoming, the judge determined that the cumulative impacts of other on-going and potential developments must be considered in an EIS on a specific project. We point this out because of the statement on Page 71 where you talk about "the completion of a thorough Environmental Analysis on a case-by-case basis." In the past, we have always been told that only the impact of the specific action being considered could be dealt with in an EIS.

It is stated on Page 70, "the exploration period during which wilderness attributes could be substantially less than now may last from 3 to 20 years, depending on exploration proposals by the lessees." This statement is somewhat misleading in that it does not go as far as it

should. Table 7 on page 38 indicates that if the development proceeds as far as the development and production stage that the disturbance could last from 30 to 40 years.

In the summary, it is stated that "if the area becomes recommended for wilderness classification, production of oil and gas might still be allowed." This statement appears to conflict with a quote on Page 1 from the RARE II FES (p. 97) that states in part, "a determination on whether national interest requires production of oil and gas *or* whether the area should be included in the wilderness system."

We have met with your personnel on several occasions and discussed problems associated with oil and gas leasing, exploration and development. The position taken by the Forest Service seems to be that since leasing is merely a paper exercise, that there is no appreciable environmental impact out there on the land. We get an entirely different viewpoint on this from industry representatives.

In the vicinity of the Blackleaf Game Range, we have been working with U.S.G.S., BLM and Rainbow Resources, Inc. The Rainbow Resources representative has reiterated to us on several occasions that if the leasing agency has concerns they had better address them before they issue the leases. He feels that when he obtains a lease, he has a binding contract and from then on, he doesn't welcome much interference.

The largest problem we have had to deal with so far in the Blackleaf vicinity has been the location of roads. No acceptable road location has been found to a well site near Muddy Creek.

In the Deep Creek Reservoir North area, we feel access roads would constitute a major threat to wildlife and wilderness values. We agree with the statement made in the Rocky Mountain Front Plan, Parts I and II, page 1-36: "Road construction will cause visual disruption through clearing of vegetation and the exposure of raw dirt. This is a very long term change. Revegetation with grass or native shrubs will soften the abrupt change but the site can never return to the natural landscape."

As pointed out in earlier correspondence, there are some bad examples of sloughing, settling and cracking of some of the "high standard" roads on the Rocky Mountain Front.

Fish, wildlife and wilderness concerns have been communicated to you in previous correspondence concerning the Deep Creek-Reservoir North area. We do not feel the Environmental Assessment adequately addresses these concerns and our position continues to be that an Environmental Impact Statement is essential to properly live up to the intent and spirit of NEPA.

Sincerely,

NELS A. THORESON,
Regional Supervisor

(3)

No. 88-905

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

PAUL C. KOHLMAN, PETITIONER

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal government's decision to issue onshore oil and gas leases for certain national forest lands constituted a "recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment," within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), which requires the preparation of an environmental impact statement to accompany such a proposal.

2. Whether Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1536 (1982 & Supp. IV 1986), which requires each federal agency to consult with the Secretary of the Interior to ensure that any action by the agency is not likely to jeopardize any endangered or threatened species, or destroy its critical habitat, permits such consultation on an incremental basis provided that it is completed prior to any irreversible and irretrievable commitment of resources.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-905

PAUL C. KOHLMAN, PETITIONER

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 852 F.2d 1223. The opinion of the district court (Pet. App. A20-A41) is reported at 685 F. Supp. 1514.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1988. Justice O'Connor extended the time within which to file a petition for a writ of certiorari until November 29, 1988. The petition was filed on November 29, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Mineral Leasing Act, 30 U.S.C. 181 *et seq.*, authorizes the Secretary of the Interior to issue oil and gas leases and other mineral leases for federal lands. The Secretary conducts this leasing program primarily through the Bureau of Land Management (BLM) of the Department of the Interior. Mineral leasing decisions regarding national forest lands have been made in consultation with the Department of Agriculture's Forest Service, which is generally responsible for management of the national forests. When mineral leasing on national forest lands has been proposed, BLM and the Forest Service have agreed that the Forest Service is the lead agency responsible for ensuring compliance with Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), which requires preparation of an environmental impact statement (EIS) for inclusion "in every recommendation or report on proposals for * * * major Federal actions significantly affecting the quality of the human environment * * *."

BLM and the Forest Service have also agreed that the Forest Service is the lead agency responsible for ensuring compliance with Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536 (1982 & Supp. IV 1986), which requires each federal agency to consult with the Secretary of the Interior to ensure that any action taken by the agency is not likely to jeopardize any endangered or threatened species, or destroy its critical habitat.[1] If the Forest Service determines that a threatened or endangered species is likely to be adversely affected, the Secretary

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[1] The Secretary of the Interior, acting through the Fish and Wildlife Service, generally has jurisdiction over nonmarine species, while the Secretary of Commerce, acting through the National Marine Fisheries Service, has jurisdiction over marine species.

must prepare a written "biological opinion" detailing how the agency action will adversely affect the species or its critical habitat (see 16 U.S.C. 1536(b)(3)(A)).

Based on the results of the NEPA and ESA inquiries, the Forest Service has been recommending to BLM whether the leases should be issued and, if issued, what conditions they should contain to protect against environmental harm. BLM, however, has retained ultimate authority to decide for itself whether to issue a mineral lease.[2]

Prior to 1981, BLM had received sixteen applications for noncompetitive oil and gas leases for lands within Montana's Lewis and Clark National Forest in an area known as Deep Creek (Pet. App. A8).[3] The Forest Service accord-

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[2] Since the leases challenged in this case were issued, however, Congress enacted the Federal Onshore Oil and Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, § 5102, 101 Stat. 1330-256 to 1330-258 (emphasis added), which amends the Mineral Leasing Act to provide that "[t]he Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture" and that:

> The Secretary of the Interior, *or for National Forest Lands, the Secretary of Agriculture,* shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources. No permit to drill on an oil and gas lease issued under this chapter may be granted without the analysis and approval by the Secretary concerned of a plan of operations covering proposed surface-disturbing activities, within the lease area.

[3] There are two classes of federal onshore oil and gas leases: competitive and noncompetitive leases. Under the Mineral Leasing Act as it existed in 1981, lands within boundaries of "known geological structures of a producing oil or gas field" outside Alaska were leased by competitive bid, if at all, and all other lands were leased noncompetitively, if at all, to the first qualified applicant. See 30 U.S.C. 226(b)-(c). The Federal Onshore Oil and Gas Leasing Reform Act of

ingly prepared an "environmental assessment" (EA) regarding the potential environmental impacts of the proposed leasing on the forest. Based on its EA, the Forest Service recommended in favor of leasing and also concluded that an EIS need not be prepared prior to leasing because the leasing itself would have no significant environmental impact (*ibid.*).

The Forest Service rested its negative determination largely on its recommendation that the leases contain standard and special stipulations restricting the lessee's right to engage in certain kinds of activities without prior agency approval (Pet. App. A27). These stipulations would include, among others: (1) a No Surface Occupancy (NSO) stipulation, prohibiting lessees from occupying or using the surface of the leased land without further specific approval from BLM (*id.* at A8; see *Conner* v. *Burford*, 848 F.2d 1441, 1444, 1447-1448 (9th Cir. 1988), petition for a writ of certiorari pending, No. 88-865); (2) a Surface Disturbance stipulation, prohibiting a lessee from undertaking a surface disturbing activity until after it has requested and received BLM's approval of the nature and location of the activity, and authorizing BLM to impose on the lessee "reasonable conditions on surface-disturbing activity," "not inconsistent with the purposes for which the lease is issued" (*ibid.*; see *Conner* v. *Burford*, 848 F.2d at 1444, 1449-1450); and (3) a Threatened and Endangered Species (T&E) stipulation, generally authorizing the federal government to preclude absolutely any activity likely to jeopardize a protected species (see Pet. App. A8; see *Conner* v. *Burford*, 848 F.2d at 1455). The EAs contemplated that NSO stipulations would be included only in leases for forest lands with distinctive surface resource

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1987, however, generally requires that federal lands be initially offered at a competitive lease sale.

values needing special protections. The Surface Disturbance stipulation and the T&E stipulation would be included in every lease (*ibid.*).

Pursuant to the ESA, the Forest Service also conducted a biological evaluation of the effects of the proposed oil and gas leasing on threatened and endangered species (Pet. App. A8, A37-A38). The Forest Service's evaluation concluded that because of lease stipulations, including the T&E stipulation, the issuance of the leases would itself have "no effect" on any of the four threatened or endangered species known to be in the national forest (*ibid.*). As required by Section 7 of the ESA, 16 U.S.C. 1536 (1982 & Supp. IV 1986), the Forest Service then formally consulted with the Department of the Interior's Fish and Wildlife Service, which issued a biological opinion that similarly concluded that the leases, as conditioned, would not themselves likely jeopardize the existence of any of the four species (Pet. App. A8, A38). The opinion also concluded that a biological opinion on matters beyond the effects of leasing itself was not appropriate at this initial stage because there was insufficient information regarding post-leasing activities (*ibid.*).

BLM subsequently issued 16 leases for which applications had been received and three simultaneous oil and gas leases by lottery (Pet. App. A8; see note 3, *supra*). The leases covered the entire 42,000 acres of Deep Creek (Pet. App. A8). All of the leases contain the Surface Disturbance stipulation and the T&E stipulation (*ibid.*). Seventy-five percent of the land leased was covered by NSO stipulations (*id.* at A28-A29).

2. Following unsuccessful administrative challenges to the issuance of the leases (Pet. App. A23-A24), respondents Bob Marshall Alliance and the Wilderness Society (collectively referred to as respondent Marshall Alliance) brought this lawsuit against the federal respondents and

several individual lessees, including petitioner Paul C. Kohlman, in the United States District Court for the District of Montana. Respondent Marshall Alliance alleged, inter alia, that the federal respondents had violated NEPA by issuing leases without first preparing an EIS and had violated the ESA by failing to prepare a biological opinion regarding all aspects of onshore oil and gas exploration, production, and development (Pet. App. A20, A24).

The district court granted summary judgment in favor of respondent Marshall Alliance (Pet. App. A20-A41). The court concluded that the federal respondents had violated NEPA by failing to prepare an EIS prior to issuing the leases (Pet. App. A24-A34). According to the court, "[l]ater site specific analysis and protective stipulations simply do not comply with NEPA's comprehensive mandate to make early informed decisions and research cumulative effects of major proposed actions" (Pet. App. A34). The court also upheld respondent Marshall Alliance's claim that the federal respondents had violated the ESA "by failing to gather species and habitat data sufficient to make an informed biological assessment of the effects of leasing the Deep Creek Area" (Pet. App. A37).

3. Relying on its recent decision in *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988), petition for a writ of certiorari pending, No. 88-865, the court of appeals affirmed in part and reversed in part (Pet. App. A1-A19). The court held that the "sale of Deep Creek leases required preparation of an EIS unless the lease 'absolutely prohibits surface disturbance in the absence of specific governmental approval' " (*id.* at A11, quoting *Conner* v. *Burford*, 848 F.2d at 1447 n.15). The court accordingly "affirm[ed] the district court's holding that the agencies violated NEPA by failing to prepare an EIS for the non-NSO leases, and reverse[d] the district court's judgment insofar as it requires preparation of an EIS for the sale of NSO leases" (Pet. App. A11). The court instructed the district court, on re-

mand, "to determine which of the Deep Creek leases are NSO leases—that is, leases in which 'the language of the stipulation, construed with the rest of the lease, absolutely prohibits surface disturbance in the absence of specific government approval' " (*id.* at A12, quoting *Conner* v. *Burford,* 836 F.2d at 1527 n.15).[4] Finally, the court of appeals also upheld the district court's ruling that the federal respondents had violated the ESA, which, the court of appeals concluded, "requires the [Fish and Wildlife Service] to prepare a biological opinion assessing the impact of the issuance of the * * * leases and of all post-leasing activities on threatened and endangered species" (Pet. App. A12-A13).

ARGUMENT

We agree with petitioner that the court of appeals erred by relying on its prior ruling in *Conner* v. *Burford,* 848 F.2d 1441 (9th Cir. 1988), petition for a writ of certiorari pending, No. 88-865, which misstates the requirements of both NEPA and the ESA. Unlike petitioner, however, we do not believe that the court of appeals' decision in this case or in *Conner* v. *Burford* clearly conflicts with a decision of another court of appeals. In addition, the practical significance of the court's NEPA and ESA rulings remains uncertain and can be more accurately assessed after the relevant federal agencies have sought to comply with those rulings and the lower courts have evaluated their efforts. Because further review at this time would therefore be premature, the petition for a writ of certiorari should be denied.[5]

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[4] The federal government, unlike petitioner, did not challenge the district court's ruling to the extent that it applies to non-NSO leases of Deep Creek, because Deep Creek is a "roadless" area (Pet. App. A7). See also *Conner* v. *Burford,* 848 F.2d at 1445 n.11.

[5] For these same reasons, we recently filed a brief in opposition to the petition for a writ of certiorari in No. 88-865, which seeks relief

1. Contrary to petitioner's claim (Pet. 6-10), the court of appeals' NEPA ruling does not irreconcilably conflict with the Tenth Circuit's decision in *Park County Resources Council* v. *United States Department of Agriculture*, 817 F.2d 609 (1987). Although the court of appeals in this case concluded that an EIS was required, while the court in *Park County* concluded that an EIS was not required, the different results reflect the very different facts present in the cases and do not necessarily mean that the courts applied fundamentally different views of the requirements of NEPA.

Specifically, the court in *Park County* rejected the plaintiffs' argument in that case that the issuance of an oil and gas lease of national forest land "always constitutes a major federal action significantly affecting the quality of the human environment under NEPA" and then found, based on the record in that case, that the "plaintiffs failed to meet their burden" of establishing that the agency acted unreasonably in declining to prepare an EIS (817 F.2d at 620-622). The court did not rule that the issuance of onshore oil and gas leases of national forest lands never requires preparation of an EIS. Instead, as the court of appeals itself made clear (*id.* at 623), it was "merely hold[ing] that, in this case, developmental plans were not concrete enough at the leasing stage to require such an inquiry." [6]

Nor, conversely, do we read the Ninth Circuit's decision in this case as resting on the absolutist position that the issuance of an oil and gas lease for national forest lands

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from the court of appeals' judgment in *Conner*. We have provided a copy of that submission to the parties in this case.

[6] At the time of the court of appeals' decision in *Park County*, the lessee was reserving its right to seek approval to drill an additional well in the future, but the lessee had already abandoned its one drilling effort and had completed its reclamation work at that site (817 F.2d at 615). An EIS had also already been prepared prior to permitting any exploratory drilling at the site (*id.* at 613, 622).

always requires an EIS. The court's ruling instead rests on its evaluation of the record in the case, including the quality and quantity of land to be leased, and the court's determination that the plaintiffs had succeeded in establishing the unreasonableness of the federal agencies' failure to prepare an EIS in the particular circumstances. As the court of appeals noted, "Deep Creek offers spectacular scenery and recreational opportunities for fishers, hikers, and outdoors enthusiasts of all kinds. Perhaps most important, it is home to a large and unique wildlife population." Pet. App. A6. In addition, unlike any of the lands at issue in *Park County,*[7] all of the 42,000 acres covered by the leases are "roadless" areas that the Forest Service has designated as a "further planning area," the wilderness attributes of which should be preserved pending completion of a study of the lands for possible "wilderness" designation under the Wilderness Act, 16 U.S.C. 1131 *et seq.* See Pet. App. A7; *Sierra Club* v. *Peterson,* 717 F.2d 1409, 1410-1411 (D.C. Cir. 1983).[8]

Indeed, for this reason, the federal respondents, unlike petitioner, did not appeal the district court's ruling that the government's issuance of non-NSO leases required the preparation of an EIS. We instead determined that the roadless character of Deep Creek warranted further environmental analysis prior to the issuance of non-NSO leases. Hence, the only aspect of the district court's NEPA ruling before this Court that we challenged in the court of appeals—the lower court's determination that an EIS was

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[7] The plaintiffs in *Park County* were challenging only a single lease, encompassing approximately 10,000 acres, none of which had ever "been designated a wilderness, wilderness study, park, or other restricted-use area" (817 F.2d at 612-613 & n.1; see *id.* at 622).

[8] The court of appeals further noted that a Forest Service study had "awarded Deep Creek the highest possible wilderness rating" (Pet. App. A7).

required even with respect to areas covered by NSO leases (approximately 75 percent of the total area leased)—was correctly reversed by that court (see Pet. App. A10-A12).

Finally, further review is not warranted at this time because subsequent regulatory developments may also diminish the practical significance of the court of appeals' NEPA ruling. In light of the Federal Onshore Oil and Gas Reform Act of 1987 (see note 2, *supra*), the Secretary of Agriculture has recently published in the Federal Register proposed regulations that, if adopted, would require all oil and gas leases issued for National Forest Lands to stipulate that "[t]he Secretary of Agriculture retains the authority under this lease to preclude all operations on a leasehold where analyses of the environment indicate such action is appropriate" (54 Fed. Reg. 3333 (Jan. 23, 1989)). If finally adopted as proposed,[9] Agriculture's regulations would change the regulatory setting substantially from that addressed by the court of appeals here. Indeed, because all future leases of national forest lands under Agriculture's proposed rules would be, in effect, NSO leases, federal respondents would not be required under the court of appeals' reading of NEPA to prepare an EIS prior to the issuance of any leases issued under that proposed regulatory scheme (see Pet. App. A10-A12).

2. We agree with petitioner that the court of appeals misconstrued Section 7 of the ESA, which requires that every federal agency, in consultation with the Secretary of the Interior, ensure that its actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of their critical habitat (see 16 U.S.C. 1536 (1982 & Supp. IV 1986)). Con-

[9] Of course, the proposed rules are subject to public comment and further internal governmental review that may prompt their substantive modification prior to the promulgation of any final rules.

trary to the court of appeals' ruling (Pet. App. A12-A13), which simply relied on its prior decision in *Conner* v. *Burford,* 848 F.2d at 1451-1458, Section 7 does not require the preparation *at the leasing stage* of a biological opinion regarding all stages of oil and gas exploration, development, and production where, as in this case and *Conner,* the lease includes a T&E stipulation, expressly empowering the federal lessor to prevent any future activities likely to harm threatened or endangered species.[10]

Under Section 7, an agency proposing to take an action must inquire of the Secretary whether any threatened or endangered species "may be present in the area of the proposed action" (see 16 U.S.C. 1536(c)(1)). If the Secretary responds that one or more such species may be present, then the agency must prepare a "biological assessment" to determine whether any such species is "likely to be affected" by the action (*ibid.*). Finally, if, as in this case, the agency determines that such an effect is likely, it must formally consult with the Secretary, who must prepare a written biological opinion "detailing how the agency action affects the species or its critical habitat" (16 U.S.C. 1536(b)(3)(A)). Whenever the Secretary finds "jeopardy or adverse modification [of habitat]," the Act requires the Secretary to "suggest those reasonable and prudent alternatives" that he believes the federal agency can take in implementing the agency action without violating subsection (a)(2)'s prohibition on action "likely to jeopardize the continued existence of any endangered species or threatened

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[10] Contrary to respondent Marshall Alliance's intimation (Br. in Opp. 5-9), the Fish and Wildlife Service did not conclude that the Forest Service had failed to comply with ESA Section 7. The Fish and Wildlife Service instead agreed with the Forest Service that, because of the T&E stipulation, further analysis of the possible impacts of oil and gas exploration, development, and production could lawfully be postponed.

species or result in the destruction or adverse modification of [critical] habitat of such species" (16 U.S.C. 1536(a)(2)).

Section 7 bars, however, only two types of action: (1) agency actions that are "likely to jeopardize the continued existence" of threatened and endangered species or that would be likely to destroy or adversely modify their critical habitat (16 U.S.C. 1536(a)(2)); and (2) following initiation of consultation, "any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)]" (16 U.S.C. 1536(d)).[11] Because of the T&E stipulation, neither of these forbidden agency practices is implicated by the issuance of a lease in the absence of a biological opinion that discusses all aspects of oil and gas development. The T&E stipulation, in effect, limits the scope of the "agency action" that is subject to Section 7's consultation requirement at the leasing stage.[12]

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[11] Indeed, by negative implication, Section 7(d)'s command that federal agencies may not make "irreversible or irretrievable commitments" of resources pending completion of consultation directly supports the lawfulness of the limited action taken by the agency in this case. The court of appeals' only response in *Conner* to Section 7(d)—that it merely "clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process" and "is not an independent authorization for 'incremental-step' consultation" (see *Conner* v. *Burford*, 848 F.2d at 1455 n.34)—is unpersuasive. Section 7(d) would be mere surplusage under the court of appeals' view. In our view, the better reading of the provision, which gives meaning to Section 7(d), is that prior to completion of consultation agencies have discretion to take some action not involving "irreversible or irretrievable commitments of resources."

[12] The T&E stipulations provide (*Conner* v. *Burford*, 848 F.2d at 1455) (footnote omitted)):

> The Federal surface management agency is responsible for

We nonetheless do not join petitioner in suggesting this Court's review at this time of the ESA issue. The decision of the court of appeals does not squarely conflict with a decision of another court of appeals and the practical importance of the ESA ruling, which is presently uncertain, can be more accurately assessed after the federal respondents in this case have made an effort to comply in good faith with the court of appeals' ruling. Accordingly, this Court's attention is not now required.

Contrary to petitioner's claim (Pet. 11), the court of appeals' ESA ruling in this case does not clearly conflict with either the Tenth Circuit's ruling in *Park County* or the District of Columbia Circuit decisions in *North Slope Borough* v. *Andrus*, 642 F.2d 589 (1980), and *Cabinet Mountains Wilderness* v. *Peterson*, 685 F.2d 678 (1982). In *Park County*, the Tenth Circuit did not even reach the ESA issue, apparently because it concluded that the plaintiffs' ESA challenge to the Forest Service's approval of an application for a permit to drill was moot because drilling had been abandoned by the time of the court's consideration of the issue (see 817 F.2d at 613, 614-615). Although the District of Columbia Circuit did reach the ESA issue in both *North Slope Borough* and *Cabinet Mountains Wilderness*, neither of those cases involved onshore leases issued under the Mineral Leasing Act. *Cabinet Mountains Wilderness* involved a plan of operations for exploratory drilling upon unpatented mining claims located under the

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assuring that the leased land is examined prior to undertaking any surface-disturbing activities to determine effects upon any plant or animal species, listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or even disallow use and occupancy that would be a violation of the [ESA] by detrimentally affecting endangered or threatened species or their habitats.

General Mining Laws (see 685 F.2d at 679; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963)). *North Slope Borough* involved offshore leases under the multiple-stage leasing process mandated by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* (see *Secretary of the Interior* v. *California,* 464 U.S. 312 (1984)), which the court of appeals in *Conner* reasoned had "mitigated the ESA requirement that the biological opinion address all phases of the mineral leasing project" (848 F.2d at 1456).[13] Although, like the dissent in *Conner* (848 F.2d at 1462-1464 (Wallace, J., dissenting) and unlike the court below, we do not believe that these differences in statutory schemes should lead to a difference in the scope of the Secretary's consultation obligations under ESA Section 7 at the leasing stage, we cannot claim that a circuit conflict presently exists on that question—which is the precise question presented here.

Finally, the importance of the ESA issue, like that of the NEPA issue, is not yet certain. The court of appeals held that the Fish & Wildlife Service must "prepare a biological opinion assessing the impact of the issuance of the Deep Creek leases and of all post-leasing activities on threatened and endangered species" (Pet. App. A13). Because much of the discussion in a comprehensive biological opinion of such scope completed at the leasing stage will necessarily be somewhat speculative, the significance of the court's ruling can be ascertained only after the federal respondents have completed their efforts to prepare such an opinion and the lower courts have had an opportunity to pass upon its adequacy. Should the court of appeals' resolution of the ESA issue ultimately prove to have the unreason-

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[13] In *Conner*, the court of appeals similarly distinguished its own earlier decision in *Village of False Pass* v. *Clark*, 733 F.2d 605 (1984), which also involved OCSLA leasing (see 848 F.2d 1456-1457).

able effect of "telescoping * * * any and every projected hazard to endangered life and to the environment into one overwhelming statutory obstacle" (*North Slope Borough*, 642 F.2d at 609), this Court's review may ultimately be warranted. Because, however, the court of appeals' ruling remains susceptible to more reasoned implementation, further review is not currently required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

In response to the briefs in opposition filed by the Bob Marshall Alliance and the Department of Justice, petitioner Kohlman respectfully submits the following reply.

I. CONTRARY TO THE ASSERTIONS OF THE RESPONDENTS; THE DECISIONS IN *BOB MARSHALL, CONNER,* AND *PARK COUNTY* RELY ON CONFLICTING RULES OF LAW; NOT ON CASE-SPECIFIC FACTS

The role of the specific environmental values of the affected land in this case and the conflicting *Park County* case has been greatly confused. In their briefs, the respondents presented copious facts about the nature of the area where the petitioner's lease is located. They then argued that the decisions in *Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988), *Bob Marshall Alliance v. Hodel,* 852 F.2d 1223 (9th Cir. 1988), and *Park County Resources Council v. United States Department of Agriculture,* 817 F.2d 609 (10th Cir. 1987), turned on the site-specific environmental sensitivity of the respective areas. Alliance Brief at 15, Department Brief at 9. Examination of the opinions in those cases does not support their conclusion.

The legal analysis of each of the decisions makes no reference to the case-specific facts; but instead, each decision relies solely on prior case law or general facts not specific to an area. *Park County* relies on the general fact that environmental impacts of full field development cannot be predicted at the leasing stage prior to exploration.[1] 817 F.2d at 622-3. Conner relies solely on the holding

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[1] The Federal Respondent's allegation that the plaintiff in *Park County* failed to meet its burden of proof is misleading. Department Brief at 8. The reason for the failure is found in the cited paragraph: "The oil and gas lease, by itself, does not cause a change in the physical environment." 817 F.2d at 622. This statement is at direct odds with *Conner* and *Bob Marshall.*

in *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), and the fact that, like the leases in *Sierra Club v. Peterson*, lease documents did not contain a stipulation completely precluding surface disturbance prior to completion of an EIS.[2] 848 F.2d at 1449. *Bob Marshall* relies solely on the holding in *Conner*, and simply contains no reference to any case-specific facts. App. 11-12.

In fact, the absence of case-specific facts in the analysis of the opinions presents an excellent opportunity for the Court to decide the important issues of the legal scope of NEPA review in the absence of confusing facts.

In all cases, as in the three discussed here, the courts will include introductory background facts. Opponents of a petition can always argue that those facts are somehow determinative of a case. In the present case, there is simply no reasonable basis for the confusion, since *Conner, Bob Marshall* and *Park County* contain no references to case specific facts in their legal analyses.

Respondent Bob Marshall Alliance takes the fact-specific confusion to an extreme. It claims that "timing of an EIS is determined on a case by case basis depending on two factors: (1) whether the lease approval represents an irretrievable commitment of resources; and (2), whether the potential environmental impacts are significant." Alliance Brief at 15. For this proposition, it does not cite to the

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[2] *Conner* does reject the possibility of mitigation, which was a disputed fact and, accordingly, cannot be appropriately relied on at summary judgment. *United States v. Diebold*, 369 U.S. 654 (1962).

opinion or any other case. There is simply no authority for this argument.

Conner and *Bob Marshall* use a purely legal formula to conclude that an EIS and a biological opinion covering full field development are required for lease issuance, but do not set environmental standards. For this reason, oil and gas lessees are left at the mercy of third party litigants who would use the precedent of *Conner*. Groups such as the Bob Marshall Alliance may invoke *Conner's* rule requiring an EIS for leasing by simply suing and demanding that the legal formula be applied. The effect will be to eliminate leasing or greatly increase its cost in areas where there is opposition to leasing.

While the Federal Respondents agree with the petitioner that the Ninth Circuit is wrong, they hope that future courts will distinguish the seemingly absolute holdings of *Conner* and *Bob Marshall*. Department Brief at 7-10. This is overly optimistic. For the leasing program to work efficiently, the executive branch, not the judiciary, must define the leasing program. The effect of the government's litigation strategy is to take discretionary decisions away from the land management administrative agencies and give them to the courts and litigants. If the strategy is allowed to take its course, such things as forum shopping, the individual proclivities of judges, and the particular issues raised by litigants will shape the future of the oil and gas leasing program.

It has taken eight years for this case to reach this forum. It may take an equal time to develop the distinguishing authority that the government hopes for. The

cost of another eight years of chaos in the leasing program will be substantial. Now is the time for this Court to review this issue and put it to rest.

II. THE ISSUE OF THIS CASE IS NOT WHETHER ANY ENVIRONMENTAL REVIEW SHOULD BE DONE, BUT IS THE REQUIREMENT OF SUPERFLUOUS ENVIRONMENTAL REVIEW

Respondent Bob Marshall Alliance suggests that reversing *Conner* would result in no environmental review. Alliance Brief at 17-18. This is simply not the case. Regulations and statutes require environmental review and approval at every stage of development of an oil and gas field. *See* 817 F.2d at 622.

The Alliance inappropriately relied on *Park County's* finding of future environmental review to distinguish that case from *Bob Marshall.* In fact, *Park County* considered the same kinds of reviews and approvals under the same regulations that were in force in the case at the bar. Nevertheless, *Park County* came to the opposite conclusion from *Bob Marshall* and held that an EIS for leasing was not necessary.[3] 817 F.2d at 622-3.

The real issue of this case, and the point of distinction between *Bob Marshall* and *Park County* is whether approval of each phase of development should revisit the

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[3] *Park County* referred to future "environmental assessments" rather than EISs. 817 F.2d at 613. In a quote of *Park County,* the Alliance inserted an ellipsis where the words "environmental assessments" appeared. Alliance Brief at 17. This was inappropriate since the issue of this case and *Park County* is whether leasing requires an EA or an EIS.

prior approvals. Initially, an EIS and a comprehensive land use plan consider environmental and oil and gas values. This planning permits a decision as to whether land should be withdrawn from leasing to protect environmental values, or continue under multiple use management which includes mineral development.[4] Next, an environmental assessment (EA) is completed and a lease is issued. Further approval, and either an EA or EIS is required for seismic exploration, exploratory drilling, development drilling, and for support facilities and access.

The government has established a system where comprehensive resource planning and resource priorities are set prior to leasing. Later environmental review determines how to minimize impacts. With certain exceptions set forth in stipulations, leases are not taken away because resource allocation decisions are made before the leases are issued. In the case of the petitoner's lease, the government evaluated two possible overriding environmental values, endangered species and wilderness, and reserved the right to effectively take away his lease if these were determined to be of paramount value.

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[4] When the leases in this case were issued, environmental values and oil and gas values were considered in Multiple Use Plans and in a Roadless Area Review and Evaluation (RARE II) EIS. RARE II's decision to allow leasing in the Deep Creek Further Planning Area was not challenged. *Conner* and *Bob Marshall* conflict with both the old and new plans and procedures in the same way.

Under *Conner* and *Bob Marshall*, prior to the time that the government has the site-specific information necessary to do an EIS for full field development, it must reconsider planning and lease issuance decisions each time it makes an additional approval. The lessee could lose his lease when seismic exploration is approved, when exploration drilling is proposed, and so on. It is possible that millions of dollars could be invested in a lease that is later cancelled.

The effect of this process is repeated opportunities for litigation on the same underlying issue. The multiple battles will not result in better leasing decisions, but will only provide avenues for those who would obstruct the process. The real decision-making will move from the land management agencies to the courts.

III. THE PETITIONER'S LEASE WAS NOT CANCELLED

There is simply no basis in the Ninth Circuit opinion for Respondent Bob Marshall Alliance's claim that the lease was set aside because of a failure to consider a meaningful no action alternative. Alliance Brief at 19. The court simply remanded for clarification in light of the opinions in *Bob Marshall* and *Conner*, neither of which set aside leases. App. 18.

CONCLUSION

For the reasons set forth in the petition and this reply, the Court should grant certiorari in this case.

Respectfully submitted,

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